Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,
PETITIONERS

v.

NADINA (MARAVILLA) GUSTILO, Individually
and as Former Administratrix of
The Estate of Armando C. Gustilo, Deceased,
and as Guardian of June Salvacion (Maravilla)
Gustilo; JOSEPH S. HORRIGAN, as Guardian Ad Litem
and Attorney Ad Litem of June Salvacion Gustilo;
and the KANALY TRUST COMPANY, as Administrator
of the Estate of Armando C. Gustilo, Deceased,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS (HOUSTON) TEXAS

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43 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether customary international law (the Law of Nations) and federal court decisions concerning comity as a policy of the United States in relationships with cooperating foreign nations are "federal law" and the "supreme law of the land" under Article VI of the U.S. Constitution.

2. Whether, under supreme law of the land, Texas courts, in determining titles of Philippine aliens to estate of deceased Philippine domiciliary, may arbitrarily refuse to discern, discuss and apply controlling Philippine statutes and case authority.

3. Whether, under the supreme law of the land and U.S. treaties, Texas court may capriciously substitute its opinion for the decision of Philippine Appeals Court and Philippine Supreme Court on Philippine issues concerning these Philippine parties.

4. Whether refusal of Texas courts to discern, discuss and apply or distinguish Philippine statutes and case authority in respect to issues of Philippine heirship, coverture or filiation constituted *denial of justice* to adversely-effected Philippine aliens for which rectification is required by the International Covenant on Civil and Political Rights and international law and the Universal Declaration of Human Rights.

5. Whether denial by Texas Court of Appeals of alien Petitioners' due process rights under Rule 90(a), Texas Rules of Appellate Procedure, to full discussion of seasonably raised foreign law issues and issue of cumulative effects of unjust and erroneous judicial acts of trial court constituted a *denial of justice* under international law and the Universal Declaration of Human Rights.

LIST OF PARTIES

The parties to the proceeding below set forth in the caption are as follows:

1. Mary Joy Ann Gustilo
2. Jose Vicente Gustilo, III
3. Nadina Maravilla Gustilo
4. Joseph A. Horrigan
5. June Salvacion Gustilo
6. Kanaly Trust Company

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

INDEX OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

Facts and Law Supporting Jurisdiction 3

STATUTES AND TREATIES INVOLVES 5

STATEMENT OF THE CASE 6

Nature of the Case 6

Courts' Refusal to Consider Foreign Decision and Foreign Law 7

Probate Court's Rejection of Motions 10

Rejection by Court of Appeals Without Discussion of Points Concerning Foreign Law or Questions of Choice of Law 12

Claimed Violations of Customary International Law and U.S. Sup. Ct. Decisions by Trial and Appellate Courts 16

Three Resulting Miscarriages of Justice 16

Concluding Statement 18

REASONS FOR GRANTING THE WRIT 18

Summary of Argument 18

Brief of Argument 20

A. In suit involving Philippine nationals and a Philippine estate, Texas Probate Court

violated "supreme federal law" by refusing to extend full credit and effect to directly applicable Philippine statutes and case law 20

B. The Texas Court of Appeals of the 14th District violated Rule 90(a) of Texas Rules of Appellate procedure and denied an essential appellate function by refusing or failing to discern, discuss and distinguish seasonably raised material law issues. Cumulative effect upon adversely affected Philippine nationals constituted not only a violation of due process rights but a *denial of justice* and appellate accountability 24

C. Texas courts, at each level, failed to accord Philippine Petitioners fair and due judicial process under applicable Philippine, New Jersey and established, customary international law. This failure or refusal to pronounce and apply applicable law results in a denial of justice to petitioners under the Law of Nations and violates the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights 27

Conclusion 30

CERTIFICATE OF SERVICE 32

APPENDICES PRINTED IN SEPARATE BOOKLET

TABLE OF AUTHORITIES

Federal Cases **Page**

Banco National de Cuba, 376 U.S. 398, 427 (1964) 23

Bank of Augusta v. Earle, 13 Peters 519, 10 L.Ed. 274 (1839) 16, 23

Butler v. Eaton, 141 U.S. 240, 11 S.Ct. 985, 35 L.Ed 713 (1891) 4, 5

Henfield's Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.) 21

Hilton v. Guyot, 159 U.S. 113, 163, 40 L.Ed. 95 (1895)16, 22

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)3, 30

The Paquete Habana, 175 U.S. 677 (1900) 4, 5, 22

Success Motivation Inst. of Japan v. S.M.I., 966 F.2d 1007 (Fifth Cir. 1992) 5

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (1984) 3, 23, 27-29

Texas Cases

Banco Minero v. Ross, 138 S.W.224 (Tex.Civ.App.-- San Antonio 1911, aff'd), 106 Tex. 522, 172 S.W. 711 (1915) 23

Fiberboard Corp. v. Pool, 813 S.W.2d 658 (Tex.App.-- Texarkana 1991, no writ) 25

Gannon v. Payne, 706 S.W.2d 304 (Tex. 1993) . . . 4, 23-24

Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979) 4, 16, 23-24

Lone Star Gas Co. v. R.R. Comm'n of Texas, 767 S.W.2d 709 (Tex. 1989) 26

Robertson v. Estate of McKnight, 609 S.W.2d 534 (Tex. 1980) 4, 23, 24

Scott v. McLennan, 306 S.W.2d 943 (Tex. Civ. App.--Waco 1957, writ ref'd n.r.e.) 25

Scurlock Oil Co. v. Smithwick, 724 S.W. 2d 1 (Tex. 1986) . 4

State Bar of Texas v. Evans, 774 S.W.2d 656 (Tex. 1989) 26

Texas Beef Cattle Co. v. Jeff Green, 921 S.W.2d 203 (Tex. 1996) 4

Wood Oil Distributing v. State of Texas, 746 S.W.2d 1 (Tex.App.--El Paso 1987, writ dism'd) 25

New Jersey Cases

Dakunzo v. Edgye, 117 A.2d 508 (NJ Sup. Ct. 1955) . 9, 15

Philippine Cases

Arsenal v. Intermediate Appellate Court, 1986 Philippine Supreme Court, Lexus 2709 (July 14, 1986) . . . 9

Macadangdang v. Court of Appeals, 199 Sup. Ct. Reports Ann. 73 (September 12, 1980) 9

Republic v. Bartolome, Vol. 138 Supreme Court Reports Annotated, 442 (1985) 8, 14

Ty Kong v. Republic of the Philippines, 94 Philippine Reports 321, 1954 8

V.D.A. DeCastro v. Republic, Vol. 134 Supreme Court Reports Ann., 14 (1985) 8, 14

Yap v. Court of Appeals (Philippine S. Ct., October 28, 1986) 9

Philippine Cases Involving the Parties to this Appeal

Gustilo v. Hon. Fernando P. Agdamag, Presiding Judge, Branch 138, Regional Trial Court, C.A. GR Sp. No. 28626, Court of Appeals, Philippines, Seventh Division 3-4, 7, 9, 12, 17, 28

Gustilo v. Court of Appeals, G.R. No. 111237, Philippine S. Ct., March 23, 1994 . . . . . 7-8, 18

Maravilla v. Local Civil Registrar of Makati, Metro Manila, Spec. Proc. No. M-130 8

International Court of Justice

Namibia Opinion, 1971 I.C.J. 3 74-75 22

Nicar. v. U.S., 1986 I.C.J. 14, 99, 100 22

Statute of the Court, Art. 38(1)(b), 1977 I.C.J. Acts and Docs. 77, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 21

United States Constitution

U.S. Constitution, Article III, Section 2 . . . . . 2, 3, 5

U.S. Constitution, Article VI, Clause 2 . . . . . ii, 4, 5

U.S. Constitution, Fifth Amendment 5, 27

U.S. Constitution, Fourteenth Amendment . . . 5, 20, 27, 30

Federal Statutes

Title 28 U.S.C. §1257(a) 3, 5-6

Title 42 U.S.C. §1983 . . . . . 6, 27

Judiciary Act of 1789, Sections 9, 13, 25 . . . . . 5-6, 27

Federal Rules

Supreme Court Rules 10(b) and (c) 3, 6

Texas Statutes

V.T.C.A., Family Code §12.02 (Amended 1987?) 6, 12, 17, 28

V.T.C.A., Family Code §2.22 . . . . . 6, 14

Texas Rules

TEX.R.APP.P. 90(a) . . . . . ii, 6, 12, 16-19, 24-26

New Jersey Statutes

R.S. 37:1-10. N.J.S.A. 6, 9

Philippine Statutes

Article 15, Civil Code of the Philippines Annotated,
Paras, Ninth Edition, 1978 . . . . . 9, 15

Article 71, Civil Code of the Philippines Annotated,
Paras, Ninth Edition, 1978 . . . . . 9, 15

Article 255, Civil Code of the Philippines Annotated,
Paras, Ninth Edition, 1978 . . . . . 8, 13-14

Article 256, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . 8, 13-14

Article 263, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . 8, 13-14

Article 1409, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . 6, 9-10

Article 2035, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . 6, 9, 13, 25

Articles 170 and 171, Family Code of the Philippines, from *The Family Code of the Philippines Explained*, Lizaso, Vol.2, 1990 Ed. 8

Treaties and Compacts

61 Stat 1174: Treaties and Other International Acts Series 1568. *Treaty of General Relations Between the United States of America and the Republic of the Philippines*. Treaty and Protocol signed at Manila July 4, 1946. Entered into force October 22, 1946. . 5, 7, 20

UNIVERSAL DECLARATION OF HUMAN RIGHTS; U.N.G.A. Res. 217, U.N. Doc. A/810 (III 1948). Adopted by the United Nations General Assembly Dec. 10, 1948. . . . . ii, 4-5, 7, 18, 26-28

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: 999 U.N.T.S. 171. Adopted by United Nations General Assembly Dec. 16, 1966. G.A. Res. 2200. Entered into force on March 23, 1976. The United States ratified the covenant on June 8, 1992. *U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights:* 138 Cong. Rec. S4781 (1991) ii,3, 4, 6-7, 18, 26-27, 29

Secondary Sources

International Law of the United States, Paust, Carolina Academic Press (1996) 4, 18, 21-22, 28

The International Responsibility of States for Denial of Justice, A. Freeman (1938) 27

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986), Sections 111, 112, 113, 711 (1987) 21, 27

The Uses of International Law, P. Jessup, 101 (1959) . . . 27

Philippine Secondary Sources

The Family Code of the Philippines Explained, Lizaso, Vol.2, 1990 Ed.(Textual matter and illustrative cases) . . 6, 8

English case: *Triquet v. Bath*, 3 Burr 1480, 1481 (cited in *Bank of Augusta, supra* (1839) 16, 22

No.

IN THE
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OCTOBER TERM, 1997

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,
PETITIONERS

v.

NADINA (MARAVILLA) GUSTILO, Individually
and as Former Administratrix of
The Estate of Armando C. Gustilo, Deceased,
and as Guardian of June Salvacion (Maravilla)
Gustilo; JOSEPH S. HORRIGAN, as Guardian Ad Litem
and Attorney Ad Litem of June Salvacion Gustilo;
and the KANALY TRUST COMPANY, as Administrator
of the Estate of Armando C. Gustilo, Deceased,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS (HOUSTON) TEXAS

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Petitioners, Mary Joy Gustilo and Jose Vicente Gustilo, III respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Fourteenth Court of Appeals of the State of Texas, entered in the above-entitled case on July 3, 1996.

OPINIONS AND ORDERS BELOW

1. Motion for Stay granted 6/12/97. Order from Fourteenth Court of Appeals reprinted at Appendix A (p.A-1).

2. Motion for Rehearing of Writ of Error, overruled 4/18/97. Notice of denial from Texas Supreme Court reprinted at Appendix B (p.A-2).

3. Application for Writ of Error denied 1/31/97. Notice of denial from Texas Supreme Court reprinted at Appendix C (p.A-4).

4. Opinion of the Fourteenth Court of Appeals entered 7/3/96. Unpublished. Reprinted at Appendix D (p.A-5).

5. Motion for Rehearing and Motion for Rehearing En Banc, Fourteenth Court of Appeals, denied August 15, 1996. Notice from Fourteenth Court of Appeals reprinted at Appendix E.

6. Judgment of Texas Probate Court No. 1, Harris County, Texas entered 6/1/92.

JURISDICTION

The Judgment of the Fourteenth Court of Appeals of Texas at Houston was entered on July 3, 1996 (see Appendix D p.A-5, *infra*). Application for Writ of Error to Texas Supreme Court was denied January 31, 1997. Motion for Rehearing of Petitioners' Application for Writ of Error was overruled on April 18, 1997. Order of denial reprinted at Appendix G, *infra*. Motion for Stay Pending Petition to United States Supreme Court for Writ of Certiorari was granted June 12, 1997.

Appellate jurisdiction of United States Supreme Court is invoked pursuant to Article III, Section 2 of the United States

Constitution[1] and pursuant to 28 USC §1257(a) and Rules 10(b) and (c) of the Rules of this Court.

Article III jurisdiction is also provided by The International Covenant on Civil and Political Rights, as ratified by Senate Resolution.[2]

Case presents an important federal question affecting United States foreign relations and Constitutional rights of aliens under protection of the United States courts by international law and by express treaty.

Facts and Law Supporting Jurisdiction

1. Conflict between state court decisions. Texas decision by state court of last resort[3] in this case[4] (hereafter "*Gustilo v. Gustilo*"): (1) refused to give credit and effect to Philippine statutory law and case authority; and (2) denied effect to

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[1] *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (1984).

[2] The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966); U.N.G.A. Res. 2200 (1976); Senate Ratification June 8, 1992. *Resolution of Advice and Consent to Ratification of The International Covenant on Civil and Political Rights:* 138 Cong. Rec. S4781 (1991) (Appendix H).

[3] Texas Supreme Court finally denied Application for Writ of Error April 18, 1997.

[4] *Jose Vicente Gustilo, III and Mary Joy Ann Gustilo, a Minor Child, By and Through her Guardian and Next Friend, Milagros Barco, v. Nadina Gustilo, Individually and as Former Administratrix of the Estate of Armando C. Gustilo, Deceased, and as Guardian of June Salvacion Gustilo; Joseph S. Horrigan, as Guardian Ad Litem and Attorney Ad Litem of June Salvacion Gustilo; and The Kanaly Trust Company, as Administrator of the Estate of Armando C. Gustilo, Deceased*, No. 14-93-00931-CV; In the Fourteenth Court of Appeals for the State of Texas.

Philippine decision *Gustilo v. Agdamag*[5], both before and after affirmation by the Philippine Supreme Court. Texas court held foreign decision was not final at time of Texas trial; therefore, Philippine decision was not to be noticed--even after it became final. Texas Supreme Court refused to correct these decisions.

Determinations (1) and (2) were upon issues governed by supreme law of the land under Article VI, Clause 2 of U.S. Constitution and under International Covenant on Civil and Political Rights and Universal Declaration of Human Rights[6]. These same questions were determined correctly by Texas Supreme Court in direct conflict with *Gustilo v. Gustilo*, viz:

As to item (1) *supra*, *Gannon v. Payne*, 706 S.W.2d 304, 306, 307 (Tex. 1993); *Robertson v. Estate of McKnight*, 609 S.W.2d 534, 537 (Tex. 1980). *Gutierrez v. Collins*, 583 S.W.2d 312, 319-321 (Tex. 1979).

As to item (2) *supra*, *Scurlock Oil Co. v. Smithwick*, 724 S.W. 2d 1, 6 (Tex. 1986), citing as authority *Butler v. Eaton*, 141 U.S. 240, 243, 11 S.Ct. 985, 986-87, 35 L.Ed 713 (1891), *Texas Beef Cattle Co. v. Jeff Green*, 921 S.W.2d 203, 214 (Tex. 1996).

2. Important question of federal law not decided. Accepting that there is much authority supporting first issue, page (i): customary international law treaties and federal decisional law concerning comity among cooperating foreign nations are the supreme federal law[7] of the land, a question then arises:

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[5] *Gustilo v. Hon. Fernando P. Agdamag, Presiding Judge, Branch 138, Regional Trial Court*, C.A. GR Sp. No. 28626, Court of Appeals, Philippines, Seventh Division.

[6] UNIVERSAL DECLARATION OF HUMAN RIGHTS, U.N.G.A. Res. 217, U.N. Doc. A/810 (III 1948).

[7] *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also International Law of the United States, Paust, Carolina Academic Press (1996). But contrast (continued...)

Whether under 28 USC 1257(a), formerly Section 25 of the Judiciary Act of 1789, and under Article III, Section 2, and Article VI, clause 2 of the U.S. Constitution and Senate Resolution 138 Cong. Rec. S.4781 (cited note 2) and related multilateral compacts (notes 2 and 6), unjust judicial acts committed by state court, by which protected alien is denied due and fair redress, may be reviewed and rectified by the United States Supreme Court on Writ of Certiorari to state court of last resort.

3. State court decision conflicts with relevant decision of Supreme Court. *Gustilo v. Gustilo* denied comity upon no more basis than caprice and in direct conflict with the federal common law and customary international policies of comity, as declared by *The Paquete Habana*, 175 U.S. 677, 700 (1900). Under *Butler v. Eaton*, 141 US 240, 243 (1891), when final decision in parallel case reverses basis for decision of lower court, lower court decision should be reversed. Failure to extend comity in this case denied reversal of conflicting probate court decision.

STATUTES AND TREATIES INVOLVED

U.S. CONSTITUTION: Article III, Section 2; Article VI, Clause 2; Fifth Amendment; Fourteenth Amendment (Appen. T)

U.S. TREATIES:

61 Stat 1174: Treaties and Other International Acts Series 1568. *Treaty of General Relations Between the United States of America and the Republic of the Philippines*. Treaty & Protocol signed Manila 7/4/46. Entered into force 10/22/46. (Appen. DD)

UNIVERSAL DECLARATION OF HUMAN RIGHTS; U.N.G.A. Res. 217, U.N. Doc. A/810 (III 1948). Adopted by the United Nations General Assembly 12/10/48. (Appen. V)

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[7](...continued)
narrow Fifth Circuit rule in diversity case, *Success Motivation Inst. of Japan v. S.M.I.*, 966 F.2d 1007 (Fifth Cir. 1992).

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: 999 U.N.T.S. 171. Adopted by United Nations General Assembly 12/16/66. G.A. Res. 2200. Entered into force 3/23/76. The United States ratified the covenant on 6/8/92. *U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights:* 138 Cong. Rec. S4781 (1991). (Appen. H)

FEDERAL STATUTES:

Title 42 §1983 USC and Title 28 §1257(a) USC
Judiciary Act of 1789, Sections 9, 13, 25 (Appen. II)

FEDERAL RULES: Supreme Court Rules 10(b), (c) (Appen. JJ)

TEXAS STATUTES AND RULES OF COURT:

Texas Family Code, Sections 2.22 and 12.02 (Appen. KK)

TEX.R.APP.P. 90(a) (Appen. LL)

NEW JERSEY STATUTES: R.S. 37:1-10. N.J.S.A. (Appen. MM)

PHILIPPINE STATUTES:

Civil Code of the Philippines Annotated, Paras, Ninth Ed., 1978: Articles 15, 71, 255, 256, 263, 1409 and 2035. (Appen. Q, R, M, K, Y and W, respectively)

Family Code of the Philippines, from *The Family Code of the Philippines Explained*, Lizaso, Vol.2, 1990 Ed.: Articles 170 and 171. (Appen. L)

STATEMENT OF THE CASE

Nature of the Case

Petitioners, Mary Joy Gustilo ("Mary Joy") and Jose Vicente Gustilo, III ("Jovi") are aliens--i.e., Philippine citizens and domiciliaries. Mary Joy and Jovi seek to retain titles to properties that devolved to them under Philippine law from their deceased father, Armando Gustilo ("Gustilo"), former Philippine governor and Philippine domiciliary.

Petitioners' titles to Gustilo estate depend upon application of unambiguous principles of Philippine statutory law and upon well-recognized and unambiguous decisions of the Supreme Courts of the Philippines and New Jersey. Petitioners claim and demonstrate flagrant denial of justice in Texas state courts resulting from refusal of those courts to yield to Constitutional imperatives regarding the supreme law of the land. This federal law includes customary international law or Law of Nations and treaties and compacts[8]. In this case, Texas courts were bound to provide Petitioners full and fair access to adjudicatory functions of the courts and adjudication in conformity with supreme federal law regarding matters of national interest and concern affecting foreign policy and international relations.

Courts' Refusal to Consider Foreign Decision and Foreign Law

Petitioners, by briefs and motions and argument, requested Texas courts to consider and apply Philippine and New Jersey law, applicable under customary international law and a natural and ordinary incident of their predominantly Philippine claims. It is apparent that all such authority has been either ignored or given no weight by the Texas courts in respect to, *inter alia*, the following:

1) *Gustilo v. Agdamag*, G.R. Sp. No. 28626, Court of Appeals, Manila, Seventh Division, February 16, 1993 (Appendix I) held compromise agreements divesting Petitioners to be void.

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[8] Treaties and compacts: UNIVERSAL DECLARATION OF HUMAN RIGHTS (cited note 6). INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (cited note 2). *U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights* (cited note 2).

61 Stat 1174: Treaties and Other International Acts Series 1568. *Treaty of General Relations Between the United States of America and the Republic of the Philippines*. Treaty and Protocol signed at Manila 7/4/46. Entered into force 10/22/46.

2) Respondents' affirmative defenses were denied on their joint motion for rehearing before the Philippine Supreme Court (*Gustilo v. Court of Appeals*, G.R. No. 111237, Philippine S. Ct., March 23, 1994 [Appendix J]). Original Philippine order denying certiorari was dated January 26, 1994.

3) Article 263 of the Philippine Civil Code[9] (Appendix K) and its nearly identical successor, Family Code of the Philippines, Articles 170 and 171 (Appendix L), prohibit action to determine the filiation of June Salvacion against her presumed legitimacy at time in question. Her mother's "correction" of public registry (*Maravilla v. Local Civil Registrar*), seven years after the date of recordation of her birth as "June Salvacion Maravilla", could not affect filiation of June Salvacion.

4) Articles 263, 255 and 256 of the Philippine Civil Code (Appendices K and M) provided the exclusive means under Philippine law of impugning June Salvacion's status as the legitimate child of Francisco Maravilla; but such an action could not have been brought by the mother of the child under Philippine law, nor could it be brought by the father after the passage of one year's time in most cases.

5) A Philippine trial court, on pleadings to correct the record of a certificate of birth, is without jurisdiction or power to adjudicate more serious issues [*Ty Kong v. Republic of the Philippines*, 94 Philippine Reports 321, 1954 (attached as Appendix N], such as filiation or heirship [*Republic v. Bartolome*, Vol. 138 Supreme Court Reports Annotated, 442 (1985), and *V.D.A. DeCastro v. Republic*, Vol. 134 Supreme

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[9] All references to the "Philippine Civil Code" are to the "Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978". References to the "Family Code of the Philippines are to the "Family Code of the Philippines, Nolledo" and to the "Family Code of the Philippines Explained, Lizaso, Vol. 2, 1990 Edition".

Court Reports Ann., 14 (1985) (pertinent excerpts attached as Appendices O and P)].[10]

6) Article 15 of the Civil Code of the Philippines (Appendix Q) provides that a foreign marriage, if void where performed, would be void in the Philippines; but if not void where performed but bigamous under Article 71 of the Civil Code of the Philippines (Appendix R), is also void in the Philippines.

7) An attempted marriage under the circumstances of the case at bar would be void. *Yap v. Court of Appeals* (Philippine S. Ct., October 28, 1986) (Appendix S). *Macadangdang v. Court of Appeals*, 199 Sup. Ct. Reports Ann. 73 (September 12, 1980) (Appendix U) holds that a recitation by applicant in a marriage license application is no evidence.

8) Nadina's bigamous second marriage obtained in New Jersey was void from its inception. *Dakunzo v. Edgye*, 117 A.2d 508 (N.J. Sup. Ct. 1955), also controlling statute R.S. 37:1-10 N.J.S.A. The recitation by Nadina on her marriage application that an annulment has occurred is not a finding or entry by a public official (see *Macadangdang* at Appendix U), but is, itself, a cause for invalidity under *Dakunzo*, *supra*.

9) Under Article 2035 of the Civil Code of the Philippines (Appendix W), the compromise agreement was void *ab initio* as attempting to create heirship and status by agreement, and as construed and applied in *Jose Vicente Gustilo, III v. Agdamag* (see Appendix I).

10) The Philippine Supreme Court, in *Arsenal v. Intermediate Appellate Court*, 1986 Philippine Supreme Court, Lexus 2709 (July 14, 1986) (Appendix F), states that:

> "Under the provisions of the Civil Code, a void contract is inexistent from the beginning. . . . [T]he right to set

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[10] No contrary decision by the Philippine Supreme Court **permitting a collateral attack on presumed filiation or legitimacy** by means of a petition for "correcting the registry" has been found, and none is believed to exist.

up the defense of its illegality [cannot] be waived (Art. 1409, Civil Code)." (*Id.* at p.A-37).

Arsenal also states that ". . . [E]quity cannot give validity to a void contract." (*Id.* p.A-38). Also, ". . . the pari delicto doctrine may not be invoked" in a case of this kind (*id.* p.A-38), and ". . . neither may the doctrine of estoppel give a validating effect to a void contract." (*Id.* p.A-38).

11) Article 1409, Chapter 9, Civil Code of the Philippines (Appendix Y), sets out the Philippine public policy against equitable defenses or indirect enforcement of void Philippine contracts.

Probate Court's Rejection of Motions

Texas probate judge was personally engaged before and during trial and handed foreign authority and statements and text excerpts attached to motions and briefs concerning rules of conflicts of laws and foreign law. Notices of foreign law were filed on 3/5/93 and 3/8/93. Foreign law was urged in numerous motions--all denied without resulting showing that any of such law was ever applied in this case (see listing and dating Appendix EE). Events wherein the trial court was pressed to extend comity to foreign authority by both Petitioners and Respondents are very extensive and are set out tersely in part in an index to appendix of foreign authority (Appendix FF) filed in Court of Appeals. August 2, 1996. Additional foreign law has been supplied the court. None of such authority has been discussed.

Texas probate jurisdiction was obtained upon Nadina's undisclosed application, filed without notice stating under oath that: (1) Armando Gustilo was domiciled in Houston, Texas, (2) she was his widow, and (3) she and her daughter, June Salvacion, were the only claimants to the estate. Some four years later, Dr. Gerardo Gustilo filed an application for determination of heirship. Mary Joy and Jovi were named among potential heirs. They intervened and filed a complaint for removal of Nadina as administratrix for defalcation and failure

to perform her duties. Nadina set up Philippine agreements negotiated with heirs while she was administratrix as basis to estop claims of Petitioners and to deny them standing. During evidentiary hearing on the matter, Nadina consented to removal. The new administrator moved the court to determine that the deceased had been a domiciliary of the Philippines. Gerardo Gustilo filed a family tree and consented to dismissal because of remoteness of any contingent interest. All remaining parties were Philippine nationals and claimants to a Philippine domiciled estate.

On December 10, 1992, administrator obtained probate court order finding Armando Gustilo to be Philippine domiciliary, on temporary visa for emergency medical purposes with bond to assure his return--contrary to Nadina's previously-sworn representations. On February 16, 1993, Philippine court of Appeals found settlement agreements relied upon by Respondents were "void ab initio" (see Appendix I). Nadina was ordered removed as administratrix of the Philippine probate proceeding--a position she had obtained by virtue of the agreements.

Thereafter, motions were presented and denied with simple notation on motion or statement in the record, unless noted otherwise, regarding Nadina's spousal claim, June Salvacion's filiation and the void agreements, viz: Motion in Limine filed 4/5/93 (Tr. 2051), Motion for Special Instruction filed 4/15/93 (Tr. 2254); Motion for Instructed Verdict (S.F. 1545, esp. 1555, 1556); Exception to defendant's offer of ALJG38 and ALGJ39 (Appendix GG); Second Motion for Partial Summary Judgment Denying Heirship Claim of Nadina (Maravilla) Gustilo (Tr. 954), filed March 8, 1993; Motion to Set Aside Partial Summary Judgment Approving Heirship Claim of June Salvacion Gustilo and Cross-Motion for Partial Summary Judgment for Denial of the Heirship Claim of June Salvacion Gustilo (Tr. 1499), filed March 25, 1993; First Amended Motion for Judgment for Jose Vicente Gustilo, III and Mary Joy Ann Gustilo (Tr. 2262), filed May 19, 1993; and Motion for New Trial (Tr. 2476), filed July 8, 1993.

Each listed motion, presented shortly prior to, during and at or shortly after the conclusion of trial, was based upon application of foreign law. In no case did the court evidence any consideration of foreign authority. Each motion was denied in parts material to this appeal. The trial court's only reference to authority in any order concerned June Salvacion's Motion for Summary Judgment and was to Texas Family Code §12.02[11] without explanation as to whether reference was to the 1975, 1987 or 1989 amendments thereof (see Tr. 754). Court based June Salvacion's Philippine heirship determination upon Texas law. Only explanation given by the trial court for not following foreign law was in relation to *Gustilo v. Agdamag*. He refused to extend comity or preclusive effects, consider the opinion as a strong expression of Philippine law, or consider that the Opinion had stare decisis effects, or that it affected the Texas ancillary estate or this case in any fashion. The decision, given orally [see Appendix X, (S.F. 560-563)] was that the Philippine Court of Appeals opinion was not final. The opinion was made final by order of the Philippine Supreme Court. Thereafter, it was expressly called to the attention of the Fourteenth Court of Appeals (hereafter "14th Court of Appeals") **before briefs were filed**. But the court found it of no effect because not final prior to conclusion of trial in the probate court (see Opinion at Appendix D, pp.A-22).

Rejection by Court of Appeals Without Discussion of Points Concerning Foreign Law or Questions of Choice of Law

Philippine petitioners requested the 14th Court of Appeals, by appellate points, and later by motions for rehearing and rehearing *en banc* to discuss issues that would have controlled decision of this case as required by Rule 90(a) T.R.A.P. The court refused by order dated August 15, 1996. The Texas Supreme Court refused Petitioners' motion to publish so that the opinion be made public and thus stand the test of public viewing. By these denials, alien Petitioners were not accorded reasonable

[11] V.T.C.A., Family Code §12.02 (Amended 1987?).

or equal access to the adjudicatory processes of the courts. A responsible review of the work of the 14th Court of Appeals was made virtually impossible on rehearing, or rehearing *en banc*, or before this Court; nor was its opinion made readily available to public scrutiny. Violations of Rule 90(a) (*id.*) were specifically and forcefully called to the attention of the court in a motion for rehearing and a motion for rehearing *en banc*, viz:[12]

> "The trial court also refused to give consideration to Philippine or New Jersey law in the same respects as the panel. Its error in so doing, in each case, was made the subject of objection, preserved as error and included in appellate points overruled by the Opinion.
>
> "*Error:* (The Opinion never discusses the panel's duty to apply the law of the jurisdictions having the most significant relationship with the particular subject matter, such as the agreement for succession and status, and such as impugnation and filiation, succession and heirship, and foreign marriage.
>
> "1. The panel Opinion (without discussion) held: Settlement Agreements in direct violation of a Philippine statute were, nevertheless, valid. The Supreme Court of the Philippines has, by affirming an express holding on the matter, determined that the statute (Article 2035 Civil Code of the Philippines, *id.*) applies to the Settlement Agreement and vitiates its every aspect.
>
> "2. Without discussion or citation of other authority, the panel has rejected as an authoritative expression of Philippine law the opinion of the Philippine Court of Appeals--confirmed by the Philippine Supreme Court--that the Settlement Agreements are void.
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> "3. The panel declined to discuss Philippine law by which the legitimacy of June Salvacion was assured

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[12] Quotation is from Motion for Rehearing at pp.28-30. Substantially the same language appears in Motion for Rehearing *En Banc* at pp.26-29.]

whether or not records of the Registrar were changed. By its precedent-setting decision, the panel has rejected long-standing public policy of the Republic of the Philippines protecting the integrity of the family (Sections 263, 255, 256 of the Civil Code of the Philippines) and has permitted a novel means of impugnation of legitimacy and means of establishing family status and inheritance rights, all without counsel representing the interests of the child and other affected parties. The simple, expedient change of the records in the Registrar's office is made to suffice. (This method of impugnation has not previously been recognized in either the Philippines or the State of Texas.)

"4. Without discussion of Sections 263, 255 and 256 of the Civil Code of the Philippines or decisions of the Supreme Court of the Philippines, contrary to its Opinion (*Republic v. Bartolome* and *DeCastro v. Republic*, *supra*), **the panel has concluded that Judge Veloso, in an *ex parte* proceeding to correct a public record, had the judicial power to determine the filiation of June Salvacion upon a petition of her mother not requesting this relief, in an ex parte proceeding seven years after her birth, in which June Salvacion was not represented, and has decided that such representations in a non-contested order are binding upon all parties in this heirship proceeding.** (In *Republic v. Bartolome* and *V.D.A. DeCastro v. Republic*, the Philippine Supreme Court held it had "set to rest" any claim that such judicial power existed in a Philippine court as a result of a petition to obtain a correction of the record.)

"5. The panel Opinion does not discuss its ruling under any hypothesis that a self-serving entry in an application by Nadina ("[X] annulled"), not the decision or act of any public official, would have no weight and, more correctly, would be inadmissible against two separate testimonial declarations under oath (one of these

declarations the trial court below accepted as "UNDISPUTED FACT" on a summary judgment motion when Nadina was defending by seeking to prove a Texas marriage under Texas Family Code Section 2.22). Near conclusion of Plaintiffs' case, the court observed: "Counsel, I don't think we are going to have a dispute that she got married to this guy [Maravilla] in 1970 or that there was a civil annulment in 1985" (S.F. 395). But the Opinion does declare valid an otherwise invalid, bigamous, 1982 New Jersey marriage of Philippine citizens, void under the laws of the New Jersey licensing jurisdiction (see *Dakunzo, supra*) and an abomination under Philippine law (. . . [Article 71, Civil Code of the Philippines] . . .). This result is made possible by mid-trial rulings by which the trial court refused to give recognition to a plainly-stated, sworn waiver of evidence (judicial admission) made in the record under oath by Nadina.

"Inasmuch as the Philippine Civil Code does not allow intrusions upon its jurisdiction to disapprove bigamy of its non-Muslim citizens regardless of the situs at which a marriage license may have been obtained (. . . [Article 15] in conjunction with . . . [Article 71], *id.*), and because records of Nadina's annulment in 1985 and her sworn testimonial declaration in the decision by Judge Veloso are available against her in Philippine Courts, conflicting decisions will occur if Opinion is not corrected. But error of panel will perpetuate itself in the Philippines if Philippine courts show comity deference to the incorrect panel Opinion.

"The underlying error of the trial court and the error of the panel, by denying **any consideration** of matured property rights of Appellants under foreign law well expressed in a final, foreign decision have denied due and fair process to Appellants and equal and reasonable access to the requirements and benefits of comity under

Texas law. The error is prejudicial, requires correction, and demands reversal and rendition."

The issues presented by Appellants' Points of Appeal, First Point, parts d, e, f and g, Second Point A, and Second Point B, parts a, c, d, h, i, j, k, l, m, n, o, and Fourth Point, were all sustainable, as a matter of law, under foreign law. It was not possible under faithful adherence to requirements of Rule 90(a) T.R.C.P. to consider and rule upon these matters without reasonable discussion of Philippine and New Jersey statutes and case law. See Appendix AA for partial listing of statutes and cases discussed in Appellants' principal brief. Additional cases and statutes have been cited in the appeal below.

Claimed Violations of Customary International Law and U.S. Supreme Court Decisions by Trial and Appellate Courts

Customary international law[13] and decisions of U.S. Supreme Court[14] of the United States would require the Texas courts below to consider the just-cited foreign state and international authority in determining the primarily Philippine questions relating to Philippine family structure, Philippine estate devolution and enforcement or invalidation of Philippine contracts or agreements. Petitioners claim that the Texas courts were not "open" to adjudicate and enforce their rights, unwilling to receive and consider their Philippine titles and authorities and denied them a due and fair trial in respect to their titles to approximately $3,000,000 of their money on deposit in a Texas trust company. In short, the courts refused to perform mandatory adjudicatory functions guided by applicable international and foreign state law.

Three Resulting Miscarriages of Justice

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[13] *Triquet v. Bath*, 3 Burr 1480, 1481, approved *Bank of Augusta v. Earle*, 13 Peters 519, 536; 10 L.Ed. 274, 283 (1839).

[14] *Hilton v. Guyot*, 159 U.S. 113, 163, 40 L.Ed. 95 (1895); *Gutierrez v. Collins*, 583 S.W.2d 312, 320-322 (Tex. 1978).

There are three unjust results of the trial and appeals in Texas courts, and, hence, three obstacles barring dominium and enjoyment by Petitioners of their titles to inheritance from their father. All are constructed or reconstructed by the Texas Probate Court upon a basis not extending beyond that court's comprehension of what it believed to be applicable Texas law. All have been condoned upon appeal with no serious discussion:

1. Texas probate court granted summary judgment[15] under Section 12.02 of the Texas Family Code. The Texas Probate Court judicially denied the legitimacy of June Salvacion in a Texas proceeding in which neither her presumed father, Francisco Maravilla, nor now deceased Armando Gustilo, were parties. To meet the requirements of the Texas Family Code, the court relied upon findings in an *ex parte* Philippine proceeding to correct clerical errors in the Philippine public registry in which June Salvacion, herself, was not a party nor represented in any fashion. The court found, on motion for partial summary judgment (absent any summary judgment evidence of insemination by Gustilo or even a basis for its inference, and no evidence of impossibility of access of Maravilla), that June Salvacion was the illegitimate daughter of the deceased, but rich in estate, Armando Gustilo.

2. Texas probate court refused requested findings and instructions to the jury that Nadina was disabled by prior coverture under Philippine law to have contracted a marriage that could be valid in the Philippines. Nadina's judicial admissions in Philippines courts will prevent her claims of spousal interest in Gustilo Philippine estate in the Philippines (see expert opinion of Philippine law, Appendix Z). Nadina swore twice, in

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[15] Appendix HH, Order of court dated June 2, 1995. Court also denied Petitioner's cross-motion for summary judgment solely based in Philippine law.

unambiguous, pled instruments, to judicially-recognized fact[16] that her coverture (marriage to Maravilla) extended more than two years beyond date of her attempted marriage to Gustilo.

3. By giving force to settlement agreement declared void at inception by the Philippine Court of Appeals, Seventh Division[17] (the validity of the agreement was the issue before the court, and all parties were present), all titles of Petitioners were found to have been transferred to court-created new Gustilo family members, Nadina and June Salvacion.

Concluding Statement

The statement set forth above is necessarily atypical. It has been necessary to discuss law, as the judicial acts principally complained of are often refusals by Texas courts to perform mandated judicial functions required by law. The statement of the case is a statement of the circumstances of those refusals.

REASONS FOR GRANTING THE WRIT

Summary of Argument

Customary international law is a part of supreme federal law[18] and grants to aliens in our state courts rights provided by international custom. Also, express rights are assured aliens by formal multilateral treaties and declarations.[19] These are also a part of federal law.

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[16] See: Opinion of Philippine Court of Appeals in *Gustilo v. Agdamag* (Appendix I).

[17] Affirmed by the Philippine Supreme Court, Third Division on January 26, 1994 in G.R. No. 111237, *Nadina G. Gustilo, etc., et al. vs. Court of Appeals, et al.*

[18] International Law of the United States, Paust, Carolina Academic Press (1996), *C. The Right to a Remedy and Related Concerns*, pp.198, 199.

[19] UNIVERSAL DECLARATION OF HUMAN RIGHTS, cited at note 6; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, cited at note 2.

Petitioners complained below that they had been denied any consideration of matured property rights under foreign law and under a final foreign decision and were denied due and fair process and equal and reasonable access to the benefits and uses of comity [Appendix X (S.F. 560-563)].

Nearly universal practice of comity and reciprocity among cooperating nations and well understood principles of conflicts of law demand that a dispute entirely among Philippine aliens involving only matters of uniquely Philippine concern be determined under Philippine law.

The Court of Appeals, apart from mention of deeply flawed chronology of events, advocated vigorously by opposing counsel,[20] repeatedly refused to consider effect of foreign law upon decisions of the trial and appellate courts, though expressly required to do so by Rule 90(a) T.R.A.P. Also, the Court of Appeals passed over, with a waive of a hand, points competently and seriously raised reflecting deeply prejudicial and cumulative effects of the trial court's one-sided pattern of error (see Opinion at Appendix D, p.A-26 - A-27 and see point of error and carefully-stated sub-points under Appellants' SIXTH POINT, reprinted at Appendix CC).

The failure of the Texas courts to give consideration to governing requirements of the supreme law of the land encompassing customary international law and cited treaties and compacts raised three issues for which standards of review or definition may bear some distinction, though each here applies,

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[20] See the following briefs and motions of Respondents filed in 14th Court of Appeals and in Texas Supreme Court, viz: *Brief of Respondent June Salvacion Gustilo in Response to Petitioners' Application for Writ of Error*, filed in Texas Supreme Court, at pp.2-3 ["While those Motions for Reconsideration were pending, the Petitioners brought an action in the Texas probate court."]; *Response to Motion for Stay Pending Petition to the Supreme Court of the United States for Writ of Certiorari*, filed 06/11/97 in the 14th Court of Appeals, at p.16 ["While the motions for reconsideration were still pending in the Philippine trial court, Jose (sic) and Mary filed this suit in the Texas probate court."

viz: (1) Petitioners are entitled to writ of certiorari and relief from the prior decisions of Texas courts because jurisdiction attaches and the decisions below contain serious errors under federal law (see especially Brief of Argument A) or (2) jurisdiction attaches and the Petitioners have suffered at the hands of state courts a "denial of justice", as that term is understood in the Law of Nations or as contemplated by relevant treaties and compacts binding the United States in its duties to these Philippine aliens (see especially Brief of Argument C), or (3) Petitioners have been denied Article VI and Fourteenth Amendment right of due process and protection of the supreme law of the land (see especially Brief of Argument B). Petitioners have asked this Court to consider whether or not they have been afforded *reasonable access* to a judicial determination of their rights under Philippine law and have been afforded an *effective remedy* as regards the recovery of approximately $3,000,000 of their deceased father's estate, deposited in a Texas trust company. They have also asked this Court to correct error in application of federal law by the lower courts. The points in the Brief of Argument necessarily overlap.

The United States Supreme Court is not powerless, for want of an appropriate jurisdictional base, to rectify intrusive judicial restructuring of a Philippine family and judicial reordering of customary Philippine devolution of a Philippine estate so as to suit uncontrolled predilections of a Texas probate court permitted to choose freely between application of Philippine or Texas or other unspecified law.

Brief of Argument

A. In suit involving Philippine nationals and a Philippine estate, Texas Probate Court violated "supreme federal law" by refusing to extend full credit and effect to directly applicable Philippine statutes and case law.

This appeal involves rights established under the constitution, laws and judicial decisions of the Republic of the Philippines

recognized by Congress of the United States on July 4, 1946[21] and currently assured respect and recognition by the Constitution, treaties, compacts and laws of the United States.

Under Article VI, clause 2 of the Constitution, the Constitution, Treaties and the "Laws of United States" are the "supreme Law of the Land; and **the Judges of every State are bound thereby**...." The "laws of the United States" include the customary "Law of Nations". Such law, while not mentioned explicitly in Supremacy Clause, is supreme federal law within the meaning of Article VI, clause 2.[22] (Our emphasis.)

> "A rule of international law or a provision of an international agreement derives its status as law of the United States from its character as an international legal obligation of the United States" [Restatement (Third) Foreign Relations Law of the United States (1986) at §111 (comment a)].

Section §112 of the Restatement (*id.*, comment a, p.58) states that "[t]he determination and interpretation of international law present federal questions, and their disposition by the United States Supreme Court is conclusive . . ."

> "State courts take judicial notice of federal law and will, therefore, take judicial notice of international law as law of the United States. Since it is a question of law, it need neither be pleaded or proved." (*Id.* at §113, comment a., p.61).

Controlling concepts of choice of law, comity, reciprocity and supreme law of the land require neither pleading nor proof.

The Statute of the International Court of Justice equates customary international law with "general practice accepted as

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[21] *Treaty of General Relations Between the United States of America and the Republic of the Philippines* (Appendix DD), cited at note 8.

[22] See Henfield's Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.). See also Paust, *infra*, note 24 and note 13.

law."[23] "U.N. resolutions have been utilized by U.S. Courts, as aids in identifying the content of customary international law."[24] "Indeed, a unanimous resolution of the General Assembly may yet be the best evidence of ... a pattern of generally shared legal expectation or *opinion juris."* as to constitute the customary Law of Nations.[25]

Paust quotes Justice Gray in *The Paquete Habana*, 175 U.S. 677 (1900) and *Hilton v. Guyot*, 159 U.S. 113:

> "International law is part of our law and *must* be ascertained and administered by the courts of justice . . . as often as such questions are presented in litigation . . . duly submitted to their determination. The most certain guide, no doubt, for the decision of such questions is a treaty or statute of this country" [quoting *Hilton v. Guyot* at 163] (emphasis in original).

Even in the absence of an applicable treaty or statute on a necessary point of law,

> ". . . the *duty still* rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so in order to determine the rights of the parties to suits . . .." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)]. (Emphasis in original.)

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[23] Statute of the International Court of Justice, art. 38(1)(b), 1977 I.C.J. Acts and Docs. 77, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. All Member States of the United Nations are automatically parties to the statute.

[24] Paust, International Law of the United States, Carolina Academic Press (1996), Chapter 1. *Customary International Law*, pp. 1-50, revised from the original: *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 Mich. J. Int'l. L. 59-91 (1990) at note 27 at p.4.

[25] See Paust, *ibid.*, at note 24; also see, e.g., Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S., 1986 I.C.J. 14, 99-100, 101-102, 106-07; Namibia Opinion, 1971 I.C.J. 3 74-75.

Chief Justice Taney of U.S. Supreme Court adopts English rule in *Triquet v. Bath* (3 Burr 1480, 1481), viz:

> ". . . Lord Mansfield quotes Lord Talbot as declaring a clear opinion, 'That the law of nations, in its full extent, was part of the law of England'--'That the law of nations was to be collected from the practice of different nations, and the authority of writers.'" (Reported as stated and cited by court in *Bank of Augusta v. Earle*, 13 Peters 519, 536, 10 LEd. 274, 283 [Sup.Ct. 1859].)

> ". . . [T]he authority of the law of nations . . . is as binding in matters of judicature--it is imperative and of absolute power. Its principles being known, can no more be set aside, evaded or disregarded than a settled principle of the common law. **Call it comity: still it is law, and part of the rights of individuals, who are wronged if it be denied to them.**" (*id.* p.536 from opinion by Chief Justice Taney). (Our emphasis.)

Customary international law includes well accepted rules relating to comity and conflicts of law. These concerns relate to United States foreign policy and should be of special concern to the United States Supreme Court [*Tel-Oren v. Libyan Arab Republic*, 726 F.2d 772, 783-4, 790 (D.C. 1984); *Banco National de Cuba*, 376 U.S. 398, 427 (1964).

Texas courts ordinarily agree with concepts of comity expressed in international affairs. cf. *Gutierrez*, *supra*, *Banco Minero*[26]; *Robertson*, *supra*; and *Gannon*, *supra*. Comity, under Texas law, is obligation of Texas courts to conform to supreme law of the land. Texas Supreme Court, in *Gutierrez*, noted "Even a casual survey of decisions from other jurisdictions indicates that elsewhere than Texas courts have experienced no great difficulty in applying foreign law . . .." (*id.* at p.321).

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[26] *Banco Minero v. Ross*, 138 S.W.224 (Tex.Civ.App.--San Antonio 1911), aff'd, 106 Tex. 522, 172 S.W. 711 (1915).

In ruling upon motions and exceptions of Petitioners, fully supported by foreign authority, probate court was bound by customary international law and supreme federal law to follow accepted principles of comity. However, Respondents have convinced each court below that: "TEXAS LAW IS CLEAR THAT COMITY IS PURELY A MATTER OF DISCRETION" (all emphasis supplied by counsel for June Salvacion). "Purely" is used in the sense of "without qualification". In this case, the Texas courts below have accepted that comity is determined parochially and is "purely" a matter of caprice. Texas or U.S. Supreme Court holdings have not been cited for such view. Texas Supreme Court opinions[27] not mentioned by Respondents would require reliance upon Philippine and New Jersey law in circumstances of this case. However, where rights of aliens are at stake and recognition of law of foreign nation is issue, proper reference is to supreme federal law, including Law of Nations.

What is presented here, though error in application of federal laws, is also absolute refusal of the reviewing courts to become open to consideration of controlling international and foreign law. This failure or refusal has denied Petitioners the very essence of due process. This was forcibly called to the attention of both courts below. But blanket denial by the courts could only be discerned clearly when it occurred--i.e., when the Court of Appeals refused to write an opinion discussing foreign law and refused a motion for rehearing (see Part B below).

B. The Texas Court of Appeals of the 14th District violated Rule 90(a) of Texas Rules of Appellate procedure and denied an essential appellate function by refusing or failing to discern, discuss and distinguish seasonably raised material law issues. Cumulative effect upon adversely affected Philippine nationals constituted not only a violation of due process rights but a *denial of justice* and appellate accountability.

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[27] *Gutierrez, supra*; *Robertson, supra*; and *Gannon, supra*.

Reference is made to pages 12-16, *supra*, relating to objections to court's refusal to adjudicate foreign law issues. Also, reference is here made to Appendix CC, consisting of pages 8 and 39-46 of Appellants' Brief in the Court of Appeals below reflecting the detail with which Appellants' Sixth Point was set forth in that brief and its careful references to the record and significant argument upon points raised.

By these references, the court is directed to matters which Court of Appeals refused to consider, discuss, or adjudicate, though seriously, carefully and correctly raised for consideration. Under T.R.A.P. §6(B), Rule 90(a), Court of Appeals was required to "hand down a written opinion . . . which shall address every issue raised and necessary to final disposition of appeal" (see pages 13, 14 *supra*). All points were succinctly raised in Appellants' Brief, with careful references made to the record.[28]

It is clear from Opinion of the Court, (Appendix D), that Court of Appeals declined to discuss just-referenced points of appeal--Second Point A and Second Point B and Fourth Point--on basis of applicable Philippine law. Fourth Point was dealt with on basis of effect given by Court of Appeals to false chronology of events offered by Respondents and an observation by the court that Philippine decision avoiding settlement agreements was not final at time of trial in probate court (see Opinion, Appendix D at p.A-26 - A27), though it was final prior to briefing in appellate court. Yet, a fatal statutory flaw under Philippine law remained undiscussed (Appendix W [Art. 2035 Phil.CC]).

Conclusion below that Petitioners initiated proceedings in Texas concerned with the validity of the settlement agreements is demonstrably false from any viewing of the record.

The Opinion contains no discussion of Petitioner's Sixth Point, as required by Rule 90(a) (*id.*). The Court of Appeals

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[28] The points are found in excerpts from Appellants' Brief, also contained in Appendix CC.

simply called the point and its carefully specified sub-points "multifarious". *Wood Oil Distributing v. State of Texas*, 746 S.W.2d 1, 3 (Tex.App.--El Paso 1987, writ dism'd); *Fiberboard Corp. v. Pool*, 813 S.W.2d 658 (Tex.App.--Texarkana 1991, no writ); and *Scott v. McLennan*, 306 S.W.2d 943 (Tex. Civ. App.--Waco 1957, writ ref'd n.r.e.) reflect approved practice in Texas of raising points for appeal that raise for consideration cumulative effect of a number of errors of trial court. This was accomplished carefully and in compliance with Texas appellate procedures. Petitioners would show that they have been severely handled in the trial and appellate court. This is a matter intended to be forestalled under the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

The Supreme Court of Texas has considered compliance with Rule 90(a) a very serious obligation of appellate courts and refers to the problem as "a recurring problem: the failure of courts of appeals to address every issue raised and necessary to final disposition of the appeal". The Texas Supreme Court has further held that Rule 90(a) is mandatory. "The courts of appeals are not at liberty to disregard them. These rules serve the salutary purpose of eliminating unnecessary delay and expense in the appellate process." ". . . [T]he rules do mandate full consideration of all issues raised to move the case as far as possible toward final disposition". *Lone Star Gas Co. v. R.R. Comm'n of Texas*, 767 S.W.2d 709, 710 and 711 (Tex. 1989). To similar effect, the Texas Supreme Court restated its position in *State Bar of Texas v. Evans*, 774 S.W.2d 656 (Tex. 1989). Discussion is contained primarily in fn. 6 at page 658.

Petitioners were denied accountability, which every suitor is entitled in respect to the court, itself. This would only have been accomplished had a **full opinion**, dealing with the true issues, been prepared and made public. Petitioners were handicapped in presentation of this petition by want of fair discussion and decision of all issues. An attempt to obtain a writ of error from the Supreme Court of Texas was also made very difficult--not only by want of an opinion from which to appeal,

but also because the opinion contained factual accounts not in keeping with the record. Failure of court to provide an opinion in accordance with Rule 90(a) T.R.A.P. was, in this case, for Petitioners, the equivalent of the denial of an appeal and is an injustice warranting reversal in accord with the Texas Supreme Court decisions just cited.

C. Texas courts, at each level, failed to accord Philippine Petitioners fair and due judicial process under applicable Philippine, New Jersey and established, customary international law. This failure or refusal to pronounce and apply applicable law results in a denial of justice to petitioners under the Law of Nations and violates the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

Drafters of the Judiciary Act of 1789 intended that aliens be assured "access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis" [*Tel-Oren v. Libyan Arab Republic*, 726 F.2d 772, 782-83 (D.C. 1984)]. Substantial denial of justice by domestic court to aliens in such manner as to implicate the national commitment of due and fair access to our courts by aliens under the Law of Nations becomes the responsibility of the United States (*id.*). A state is held responsible for the decision of one of its courts which violates international law [P. Jessup, The Uses of International Law, 101 (1959)] or violates due process considerations as extended to aliens. States also bear directly a responsibility under international law[29]. The state judiciary is an instrumentality of the state capable of violating Fourteenth Amendment rights and Article VI rights, or even rights under Title 42 §1983 USC. After the state, itself, refuses to correct such violations, the matter is ripe for consideration by the United States Supreme Court.

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[29] See The International Responsibility of States for Denial of Justice, A. Freeman, 1938.

Due process, promised to these Philippine aliens by extension of Constitutional rights secured to our own citizens under Clause 2, Article VI and under Fifth and Fourteenth Amendments, and also assured under international law, treaties and compacts[30], is denied by impermissibly limited and qualified access to courts; for a court that "refuses . . . to apply international law denies its own validity"[31]. Arbitrary refusal of the court to exercise fully adjudicative functions of its jurisdiction, properly invoked by Petitioners, is effective denial of access to the judicial process and a *denial of justice* (*id.* §711 and *Tel-Oren*, *supra*, at 783).

Petitioners have demonstrated that they have been denied titles assured to them under law of their native land. Texas Courts have refused to give recognition to those laws. The Court of Appeals below has refused to disclose the basis upon which it has avoided application of controlling Philippine law. Apart from the Supreme Court of the United States, Petitioners are now powerless to obtain redress. Issues in this case do not touch any American citizen or Texas property.[32] Yet, incredibly, a Texas probate court has decided the most delicate questions of Philippine family law on the basis of Section 12.02 of the Texas Family Code and an *ex parte* summary decision to correct a public registry. A Texas Court of Appeals has refused to be informed or aided by the opinion of the Philippine Seventh Court of Appeals (affirmed by the Philippine Supreme Court) on the very central issue in this case, fully tried and argued in the forum best suited to its determination. That court neither recognized nor discussed the decisions of the highest courts in the Philippines--especially *Gustilo v. Agdamag*, involving these

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[30] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 (1986).

[31] Paust, *supra*, note 24 at p.8.

[32] Funds deposited in the Kanaly Trust Company are funds of a Philippine estate.

very parties and issues. Nor has the court fully disclosed the basis of its holdings. (See Statement of the Case, *supra*, p.12-16).

Titles to Mary Joy and Jovi's family inheritance have been taken from them and placed in the hands of doubtful pretenders. Have they redress?

The Universal Declaration of Human Rights provides:

> "Article 7. All are equal before the law and are entitled--to equal protection of the law . . ."
>
> "Article 8. Everyone has the right to an effective remedy in the competent **national tribunals** for acts violating the fundamental rights granted him by the constitution or by law." [Emphasis added.]
>
> "Article 10. Everyone is entitled in equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations. . .."

Article 2. 3. of the Covenant on Civil and Political Rights (see note 2, *supra*) commits United States to ensure that *"(a) ...any person* whose rights or freedoms as herein recognized are violated shall have an ***effective remedy***, notwithstanding that the violation has been committed by persons acting in an *official capacity.... (b) "...any person* claiming such remedy shall have his right thereto determined by *...competent judical authority."* (Our emphasis).

Justice Edwards, speaking for the court in *Tel-Oren*, note 1, *supra,* cites Alexander Hamilton and James Madison in concerns about state courts handling matters affecting foreign aliens such as heirs of former Philippine Governor Armando Gustilo, viz:

> "The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well

> as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned." THE FEDERALIST No. 80, at 536 (A. Hamilton) (*id.* 783).

Conclusion:

Petitioners cited *Martin v. Hunter's Lessee* as authority in this case. [See note 1, supra.] *Martin* is strikingly similar to the matter presently before the court (*Gustillo*). *Martin* involved refusal of a Virginia court to obey mandates arising under supreme federal law, including the Law of Nations and encompassing Treaty in a matter affecting the title of an alien (Denny Martin, a British subject), to an inheritance. *Gustillo* involves refusal of the Courts of Texas to obey mandates arising under of supreme federal law, including the Law of Nations and significant Treaties and Compacts in a matter involving titles of aliens, (Mary Joy and Jose Vicente Gustillo, Philippine nationals) to an inheritance. Justice Story delivered the opinion in *Martin*:

State courts "...are expressly bound by the letter of the constitution; and if they should *unintentionally* transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute or irresistible force than for giving in to the acts of the other co-ordinate departments of state sovereignty" (*id.* p.344).

This Petition for Writ of Error establishes a *prima facie* showing of injury suffered due to state court mishandling of questions seriously implicating federal concerns, of denial of due process and fair and equal access to the right of appeal in Texas, of denial of justice under international standards of comity and choice of law, of virtual denial of Philippine birth rights of Petitioners by way of denial of Philippine estate succession under Philippine law and of denial of Fourteenth Amendment due process and Article VI protection.

For such reason, it is respectfully suggested that writ of error should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Raymond M. Hill, Attorney for Petitioners, do hereby certify that on this the _____ day of July, 1997, true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Supreme Court were sent by certified mail, return receipt requested, in accordance with Rule 29 of the Supreme Court Rules, to the following counsel for Respondents:

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ATTORNEYS FOR KANALY TRUST COMPANY, SUCCESSOR ADMINISTRATOR OF THE ESTATE OF ARMANDO C. GUSTILO

Raymond M. Hill

Supreme Court, U.S.
FILED

97 . 1 3 6 JUL 1 7 1997

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,
PETITIONERS

v.

NADINA (MARAVILLA) GUSTILO, Individually
and as Former Administratrix of
The Estate of Armando C. Gustilo, Deceased,
and as Guardian of June Salvacion (Maravilla)
Gustilo; JOSEPH S. HORRIGAN, as Guardian Ad Litem
and Attorney Ad Litem of June Salvacion Gustilo;
and the KANALY TRUST COMPANY, as Administrator
of the Estate of Armando C. Gustilo, Deceased,
RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS (HOUSTON) TEXAS

VOLUME 1 OF 2 (APPENDICES A - S)

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81 pp

INDEX TO APPENDIX

APPENDIX A - Order from Fourteenth Court of Appeals Granting Motion for Stay A-1

APPENDIX B - Notice from Texas Supreme Court that Motion for Rehearing of Writ of Error Overruled . . A-2

APPENDIX C - Notice from Texas Supreme Court that Application for Writ of Error Denied A-4

APPENDIX D - Opinion of the Fourteenth Court of Appeals A-5

APPENDIX E - Notice from Fourteenth Court of Appeals that Motion for Rehearing and Motion for Rehearing En Banc Denied A-31

APPENDIX F - *Arsenal v. Intermediate Appellate Court*, 1986 Philippine Supreme Court, Lexus 2709 (July 14, 1986) A-33

APPENDIX G [Duplicate copy of Appendix B] - Notice from Texas Supreme Court that Motion for Rehearing of Writ of Error Overruled A-41

APPENDIX H - The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966); U.N.G.A. Res. 2200 (1976); Senate Ratification June 8, 1992. *Resolution of Advice and Consent to Ratification of The International Covenant on Civil and Political Rights:* 138 Cong. Rec. S4781 (1991) A-43

APPENDIX I - Excerpts from opinion of Philippine Court of Appeals, *Gustilo v. Agdamag*, G.R. Sp. No. 28626) A-44

APPENDIX J - *Gustilo v. Court of Appeals*, G.R. No. 111237, Philippine S. Ct., March 23, 1994 . . . . . A-51

APPENDIX K - Article 263, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-52

APPENDIX L - Articles 170 and 171, Family Code of the Philippines Explained, Lizaso, Vol. 2, 1990 Edition" A-53

APPENDIX M - Articles 255 and 256, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-54

APPENDIX N - *Ty Kong v. Republic of the Philippines*, 94 Philippine Reports 321, 1954 . . . . . A-55

APPENDIX O - *Republic v. Bartolome*, Vol. 138 Supreme Court Reports Annotated, 442 (1985) A-58

APPENDIX P - *V.D.A. DeCastro v. Republic*, Vol. 134 Supreme Court Reports Ann., 14 (1985) A-63

APPENDIX Q - Article 15, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-67

APPENDIX R - Article 71, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-68

APPENDIX S - *Yap v. Court of Appeals* (Philippine S. Ct., October 28, 1986) A-69

APPENDIX T - Excerpts from United States Constitution A-78

APPENDIX U - *Macadangdang v. Court of Appeals*, 199 Sup. Ct. Reports Ann. 73 (September 12, 1980) A-80

APPENDIX V - UNIVERSAL DECLARATION OF HUMAN RIGHTS; U.N.G.A. Res. 217, U.N. Doc. A/810 (III 1948) . A-89

APPENDIX W - Article 2035, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-90

APPENDIX X - Statement of Facts excerpt, pages 560-563 A-91

APPENDIX Y - Article 1409, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-93

APPENDIX Z - Legal opinion of Arturo M. Tolentino A-94

APPENDIX AA - Partial listing of foreign statutes and cases discussed in Appellants' principal brief A-100

[APPENDIX BB intentionally omitted]

APPENDIX CC - Point of error and sub-points under Appellants' sixth point of error A-116

APPENDIX DD - 61 Stat 1174: Treaties and Other International Acts Series 1568. *Treaty of General Relations Between the United States of America and the Republic of the Philippines* A-118

APPENDIX EE - Listing of numerous motions urging probate court to notice and apply foreign law A-119

APPENDIX FF - Index to appendix of foreign authority filed in Court of Appeals August 2, 1996 . . . . . A-123

APPENDIX GG - Exception to defendant's offer of ALJG38 and ALGJ39 . . . . . A-137

APPENDIX HH - Order of court dated June 2, 1995 granting summary judgment A-139

APPENDIX II - Federal Statutes A-141

APPENDIX JJ - Federal Rules A-144

APPENDIX KK - Texas Statutes and Rules of Court . . A-145

APPENDIX LL - Tex.R.App.P. 90(a) A-147
APPENDIX MM - New Jersey Statute A-148

APPENDIX A

(Notice from Fourteenth Court of Appeals that
Motion for Stay Pending Petition to Supreme Court
of the United States was GRANTED)

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

June 12, 1997

Re: Case No. 14-93-00941-CV

Style: Gustilo, Mary Joy Ann, a Minor child, by and through her Guardia [sic] v. Gustilo, Nadina G., Et Al

Please be advised that on this date the Court GRANTED petitioner's motion to stay pending petition to the supreme court o the United States for writ of certiorari in the above captioned cause; time extended to and including September 12, 1997.

T. C. Case # 214,659-401 Mary Jane Smart, Clerk

APPENDIX B

(Notice from Texas Supreme Court that
Motion for Rehearing of Writ of Error Overruled)

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

April 18, 1997

Mr. Raymond M. Hill
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910 Louisiana
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Mr. William S. Hart
Hart & Associates
2650 Fountainview, Suite 416
Houston, Texas 77057

RE: Case Number 96-0843
Style: MARY JOY ANN GUSTILO and JOSE VICENTE GUSTILO, III v. NADINA (MARAVILLA) GUSTILO, individually and as former administratrix of the estate of ARMANDO C. GUSTILO, deceased, et al.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error, as

amended, in the above styled case. Motion for leave to file appendix and corrections was granted. Petition to publish court of appeals opinion, pursuant to Rule 90(c), Texas Rules of Appellate Procedure, was denied. Motion for assessment of damages for delay was overruled. Motion to strike amended motion for rehearing was overruled.

Sincerely,

John T. Adams, Clerk

by_____
Michael C. Murphey, Deputy

cc: Ms. Mary Jane Smart, Clerk

APPENDIX C
(Notice from Texas Supreme Court that
Application for Writ of Error Denied)

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

January 31, 1997

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RE: Case Number 96-0843
Style: MARY JOY ANN GUSTILO and JOSE VICENTE GUSTILO, III v. NADINA (MARAVILLA) GUSTILO, individually and as former administratrix of the estate of ARMANDO C. GUSTILO, deceased, et al.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error, as amended, with the notation "Writ Denied".

Sincerely,
John T. Adams, Clerk

by_____
Michael C. Murphey, Deputy

cc: Ms. Mary Jane Smart, Clerk

APPENDIX D

(Opinion - Fourteenth Court of Appeals)

In The

Fourteenth Court of Appeals

NO. 14-93-00941-CV
JOSE VICENTE GUSTILO, III, AND MARY JOY ANN GUSTILO, A MINOR CHILD, BY AND THROUGH HER GUARDIAN AND NEXT FRIEND, MILAGROS BARCO,
Appellants
V.
NADINA GUSTILO, INDIVIDUALLY AND AS FORMER ADMINISTRATRIX OF THE ESTATE OF ARMANDO C GUSTILO, DECEASED, AND AS GUARDIAN OF JUNE SALVACION GUSTILO; JOSEPH S. HORRIGAN AS GUARDIAN AD LITEM AND ATTORNEY AD LITEM OF JUNE SALVACION GUSTILO; AND THE KANALY TRUST COMPANY AS ADMINISTRATOR OF THE ESTATE OF
ARMANDO C. GUSTILO, DECEASED, Appellees

On Appeal from the Probate Court
Number 1
Harris County, Texas
Trial Court Cause No. 214-659-01

O P I N I O N

This is an appeal from a suit filed in the probate court by Jose Vicente Gustilo, III, and Milagros Barco as guardian and next friend of Mary Joy Anne Gustilo. The probate court entered a take nothing judgment on plaintiffs claims for damages and found that plaintiffs' were not entitled to any further share or interest in the Estate of Armando C. Gustilo (the Estate). We affirm.

FACTUAL AND PROCEDURAL HISTORY

On December 19, 1986, Armando C. Gustilo (Gustilo) died intestate in Houston, Texas. He left substantial assets in the United States and the Philippines. On June 2, 1987, Nadina Gustilo (Nadina) filed an application for administration of the Estate in which she claimed to be Gustilo's surviving spouse. On June 17, 1987, the probate court appointed Nadina administratrix of the Estate, and she continued in that capacity until 1991 when she resigned and the Kanaly Trust Company was appointed successor administrator.

Meanwhile, in the Philippines, Gustilo's son Jose Vicente Gustilo, III (Jose), and Gustilo's daughter Mary Joy Anne Gustilo (Mary), moved for letters of administration and asked that Gustilo's brother be appointed administrator. In August of 1987, Mary, through her mother and guardian, Milagros Barco, entered into a "Compromise Agreement" with Nadina by which Mary waived and renounced her right to inherit from Gustilo. In return, Nadina gave Mary cash and property totalling $600,586.00. In February of 1988, Jose entered into a similar agreement with Nadina and received cash and property worth $717,703.00. These agreements were brought before a Philippine court for approval and were approved on March 1, 1988.

Several months after entering the agreements with Nadina, Jose and Mary filed motions asking the Philippine court to reconsider its order of March 1, 1988, approving the agreements. These motions alleged the compromise agreements were obtained through fraud and mistake due to alleged fraudulent concealment by Nadina. Jose and Mary claimed Nadina had misrepresented the size and value of the Estate in order to get them to settle for less than they were actually due.

In 1991, while the motions for reconsideration were pending, Jose and Mary filed suit in the Texas probate court

where the administration of the Estate was pending. In that suit they asked: (1) the court to declare Jose and Mary as Gustilo's children and sole heirs; (2) the court to declare that Nadina was not Gustilo's surviving spouse and that her daughter June Salvacion Gustilo (June) was not his child or heir, (3) the court to declare the compromise agreements void based on Nadina's fraudulent concealment; (4) for an accounting of the Estate monies because they suspected Nadina had taken and misused Estate funds; (5) that Nadina be required to return Estate assets; and (6) for damages based on fraud, breach of fiduciary duty, trust conversion, and "intentional tort" committed by Nadina. Nadina, individually, as former administratrix, and as June's guardian, answered by general denial and affirmatively pled the defenses of compromise and settlement, release, waiver, estoppel, and quasi-estoppel.

While the case was pending in the probate court in Texas, the Philippine trial court denied the motions for reconsideration filed by Jose and Mary. This order was entered April 6, 1992. Jose and Mary appealed. The appellate court held the Philippine trial court committed a "grave abuse" of discretion when it denied the motions for reconsideration and found the March 1, 1988, and the April 6, 1992, orders were "null and void ab initio" and ordered them set aside. The Philippine trial court was ordered to: (1) continue with the proceedings for appointment of an administrator; (2) determine the relationship of Nadina and June to Gustilo; (3) resolve all other pending matters related to the Estate; and (4) close the administration of the Estate by proper declaration of heirs and distribution.

Nadina filed a motion for reconsideration with the Philippine appellate court. Her motion was denied and she appealed the case to the Philippine supreme court. On January 24, 1994. the supreme court affirmed the decision of the appellate court.

TEXAS PROBATE COURT RULINGS AND JUDGMENT

Before trial, both sides filed partial motions for summary judgment concerning the heirship of Jose, Mary, and June. The trial court granted these motions and entered partial summary judgments declaring that Jose, Mary, and June are the children of Armando Gustilo and **are, therefore, his heirs. Jose and Mary also filed a motion for partial summary judgment concerning Nadina's relationship to Gustilo. They asked the court to find as** a matter of law that Nadina was not Gustilo's surviving spouse, or, alternatively, to make certain findings under Texas Rule of Civil Procedure 166a(e). There is no order in the record granting or denying this motion; however, the trial court did submit the question of whether Nadina was Gustilo's surviving spouse to the jury, therefore, he implicitly denied the motion.

After Jose and Mary rested their case-in-chief, the trial court granted June's motion for an instructed verdict on the cross-action for damages filed by Jose and Mary. The court submitted the remaining issues to the jury. The jury found: (1) Jose and Milagros Barco, as Guardian and next friend of Mary, had released any and all claims to the estate; (3) neither Jose nor Milagros were fraudulently induced to enter settlement agreements with Nadina concerning the estate; (4) Jose and Milagros waived, renounced, and repudiated any claim to the estate; (4) neither Jose nor Milagros were fraudulently induced to waive any claim to the estate; (5) the Compromise Agreements entered into by Jose and Milagros were "fair" contracts; (6) neither Jose nor Milagros were fraudulently induced to enter the Compromise Agreements; (7) both Jose and Milagros were prevented from claiming any further benefits from the Estate based on the doctrine of "quasi-estoppel;" and (8) that Nadina is the surviving spouse of Armando C. Gustilo.

Based on the jury's answers, the partial summary judgments, and the instructed verdict, the probate court

entered judgment that: (1) Jose, Mary, and June are the children and heirs of Armando C. Gustilo; (2) Nadina is the surviving spouse of Armando C. Gustilo and entitled to a spouse's share of the estate; and (3) Jose and Mary are not entitled to any further share or interest in the Estate and should take nothing on their claims for damages. Jose and Mary filed this appeal.

ISSUES RAISED BY APPELLANTS

1. NADINA AS GUSTILO'S SURVIVING SPOUSE

In their first point of error, Jose and Mary, appellants, complain Nadina should not have been found to be Gustilo's surviving spouse. Appellants' two basic contentions are: (1) the trial court erred in refusing to make findings as requested pursuant to rule 166a(e); and (2) the evidence is legally and factually insufficient to support a finding that Nadina was Gustilo's surviving spouse.[1]

First, appellants contend the trial court was required to make certain fact findings as requested under rule 166a(e) of the Texas Rules of Civil Procedure. Appellants asked the probate court to find fifteen allegedly undisputed facts. The majority of these requested fact findings related to Nadina's claim that she was Gustilo's surviving spouse. Rule 166a(e) states:

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[1] Appellants' first point of error contains eight sub-points, including claims that the trial court erred in failing to grant their: (1) motion for directed verdict; (2) motion for judgment; (3) motion for new trial: and (4) motion to set aside the jury's answer to jury question twenty. They also claim the trial court erred in submitting the jury question on the marriage issue over their objection. Because these motions are challenges to the sufficiency of the evidence, we address them accordingly. *See T.O. Stanley Boot Co. v. Bank of El Paso*. 847 S.W.2d 218, 220 (Tex. 1992); *Trihle &: Stephens Co. v. Consolidated Servs., Inc.*, 744 S.W.2d 945, 947 (Tex. App.—San Antonio 1987, writ denied). *See also* W. Wendall Hall, *Revisiting Standards of Review in Civil Appeals*. 24 ST. MARY'S L.J. 1041, 1132 (1993).

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

TEX. R. Civ. P. 166a(e).

Appellants interpret this rule to mean that a trial court must enter an order containing factual findings that are "without substantial controversy." Essentially, appellants argue rule 166a(e) requires a trial court to make findings of fact in a summary judgment context, much like those that are requested following a nonjury trial. *See* TEX. R. CTV. P. 296. We disagree.

A movant for summary judgment is entitled to an interlocutory order under rule 166a(e) if he demonstrates he is entitled to relief as to some, but not all parties, or as to a part, rather than the whole case. *See Cassidy v. Northwest Tech Ctr. Assoc., Ltd.*, 785 S. W.2d 407, 411 (Tex. App.—Dallas 1990, writ denied); *Texas United Ins. v. Burt Ford Enterp. Inc.*, 703 S.W.2d 828, 832 (Tex. App.—Tyler 1986, no writ). To be entitled to an order under rule 166a(e) the movant most show he is entitled to part of the relief sought. *Id.* Thus, rule 166a(e) is nothing more than a rule allowing for partial summary judgment. It does not require the trial court to make findings on *facts* that are undisputed unless the

cumulative effect of those facts entitle the movant to relief. The facts appellants asked the court to find would not entitle them to a partial summary judgment. Therefore, the probate court did not err in denying appellants' request for findings of fact even if those facts were "without substantial controversy."[2]

Second, appellants contend the evidence was legally and factually insufficient to support the jury's finding that Nadina was Gustilo's surviving spouse. When an appellant challenges both the legal and factual sufficiency of the evidence supporting a jury's finding, the appellate court should first review the legal sufficiency challenge. *Glover v. Texas Gen. Indem. Co,* 619 S W.2d 400, 401 (Tex. 1981). Legal sufficiency points assert there is a complete lack of evidence on an issue. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Text App.—Amarillo 1988, writ denied). These points of error are designated as "no evidence" or "matter of law" points depending upon whether the complaining party had the burden of proof. *Id.* In this case, the jury question initially placed the burden of proof on Nadina to prove a prima facie case because she was the party attempting to prove the existence of the marriage. However, once she presented prima facie evidence, there was a presumption of the validity of the marriage to Gustilo, and the burden shifted to appellants to prove the second marriage was invalid because the first was never annulled or dissolved through divorce. Appellants do not complain that Nadina failed to make her prima facie case; rather, they argue there was evidence presented that conclusively established the continued existence of Nadina's first marriage to Francisco Maravilla, and thus, the invalidity

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[2] Under the sub-points relating to their 166a(e) argument, appellants raise arguments based on the concepts of judicial admission, judicial estoppel, and quasi-admissions; however; because rule 166a(e) is inapplicable. These arguments are irrelevant.

of Nadina's marriage to Gustilo. Therefore, appellants bear the burden of proof and the legal sufficiency point in this case is a "matter of law" point. *See id. See also W.* Wendall Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1041, 1133 (1993) (stating that if appellant attacks legal sufficiency of adverse finding on issue where he has burden of proof, "matter of law" is proper designation of point of error).

Challenges to the legal sufficiency may only be sustained when the record shows: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; and (4) the evidence established conclusively the opposite of a vital fact.
Juliette Fowler Homes, Inc. v Welch Assoc. Inc., 793 S.W.2d 660, 666 n.9 (Text 1990). In reviewing "matter of law" points, the appellate court first examines the record for evidence that supports the finding while ignoring all evidence to the contrary. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Text 1989). If there is no evidence to support the finding, the reviewing court will then examine the entire record to determine if the contrary proposition is established as a matter of law. *Id.* If the contrary proposition is established conclusively by the evidence, the point of error should be sustained. *Meyerland Community Improvement Ass'n v. Temple,* 700 S.W.2d 263, 267 (Tex App.—Houston [1st Dist] 1985, writ refd n.r.e.).

In support of her claim that she was legally married to Gustilo, Nadina introduced her New Jersey marriage license. On that license, Nadina admitted she had been married to Maravilla, but also checked the box on the form designated "annulled". Thus, this document, along with other evidence

presented[3], establishes a prima facie case of Nadina's marriage to Gustilo and is some evidence that Nadina's first marriage was annulled before she married Gustilo in 1982.

The evidence introduced by appellants to show Nadina's first marriage to Maravilla was still valid at the time she married Gustilo consisted essentially of two exhibits: (1) a petition filed by Nadina in the Philippines to correct June's birth certificate; and (2) facts stated by the Philippine court in its decision declaring the compromise agreement null and void

Appellants argue that these documents are judicial admissions by Nadina that conclusively establishes she was still legally married to Maravilla after she attempted to marry Gustilo. In the petition filed by Nadina, she asked to have June's birth certificate changed to reflect that Gustilo, rather than Maravilla, was the child's father. In that petition, Nadina stated "Petitioner is legally married to Francisco J. Maravilla." This petition was filed March 17, 1983, after the marriage to Gustilo took place in New Jersey. Attached to the petition is a document showing Nadina and Maravilla were given an annulment by the Diocese of Bacolod on February 28, 1978.

The second document, the decision by the Philippine court, states that Nadina, in pleadings filed in that court, admitted her marriage to Maravilla was annulled March 12, 1985, almost three years after she allegedly married Gustilo. However, while the court stated that this made Nadina's status as Gustilo's widow questionable, the court never reached that issue because the only question before it was the validity of the compromise agreement. Further, the pleadings to which the court refers, those in which Nadina allegedly admitted the

---

[3] Several family witnesses testified of their knowledge of Gustilo's marriage to Nadina in 1982. None of these witnesses gave testimony about the date of the annulment of Nadina's first marriage.

date of the annulment, were not attached and are not part of this record.

For a judicial admission to exist and be conclusive against a party it must be shown: (1) the declaration relied on was made during the course of a judicial proceeding; (2) the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person making it; (3) the statement was deliberate and unequivocal; (4) giving conclusive effect to the declaration will be consistent with public policy; and (5) the testimony is such that it relates to a fact upon which a judgment for the opposing party may be based. *Balaban v. Balaban, 712* S.W.2d 775, 777-78 (Text App.—Houston [1st Dist.] 1986, writ refd n.r.e.). Nadina's statement in the petition to change her daughter's birth certificate does not meet the first element because pleadings in other actions which contain statements inconsistent with a party's present position are not conclusive, but are merely some evidence which the admitter may explain, contradict, or deny. *State v. Brazos River Harbor Navigation Dist., 831* S.W.2d *539, 544-45* (Text App.Corpus Christi 1992, writ denied).

Likewise, the second document does not meet the requirement of a judicial admission. First. there is no showing of a judicial admission by Nadina because the document was a recitation of what the court said was admitted, and the statement was made, if at all, during the course of a different judicial proceeding.

Testimonial declarations, or quasi-admissions, such as those in the documents from the Philippines, are merely some evidence and are not conclusive. *See Mendoza v. Fidelity and Guarantey Ins. Underwriters, Inc.,* 606 S.W.2d 692, 694 (Tex. 1980). The weight to be given such admissions is decided by the trier of fact. *Id.* Only if a "quasi-admission" meets the requirements of a judicial admission will it be binding on the admitter. *Id* Thus, because the statements made

in the Philippine documents do not comport with the requirements of a judicial admission they are merely some evidence, which was contradicted by other evidence, specifically the New Jersey marriage license.

Appellants also ask this court to look at statements made by Nadina in summary judgment responses and summary judgment evidence. We decline to do so because these documents were not introduced into evidence, despite repeated invitations from the trial court. Therefore, they were not part of the evidence submitted to the jury and should not be included in a sufficiency review.

After reviewing the evidence that was actually admitted, both supporting and negating the jury's answer to question twenty, we hold there was both legally and factually sufficient evidence for the jury to have found that Nadina was Gustilo's surviving spouse.[4] Appellants' first point of error, including all sub-parts, is overruled.

2. JUNE AS GUSTILO'S DAUGHTER AND HEIR

Before trial, June filed a motion for partial summary judgment claiming she was Gustilo's daughter and heir as a matter of law. The trial court granted this motion and entered a partial summary judgment that June is Gustilo's heir. Jose and Mary filed a motion to set aside the partial summary judgment in favor of June, and filed a cross-motion for summary judgment asking the court to deny June's claim. In their second point of error, appellants allege the trial court

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[4] In their brief, appellants provide argument on conflicts of law and the appropriate law to be applied in determining whether Nadina was Gustilo's surviving spouse. We have reviewed the law from each jurisdiction potentially involved in this case and find our conclusion that the evidence was sufficient to support the jury's finding is correct under Texas, New Jersey, or Philippine law.

erred in granting June's motion for partial summary judgment and denying their cross-motion for partial summary judgment.

A motion for summary judgment is not entitled to the same deference as a judgment following a trial on the merits. *Montgomery v. Kennedy, 669 S.W.2d 309, 310-11* (Tex. 1984). The Texas Supreme Court has clearly instructed appellate courts on the appropriate standard to be used when reviewing summary judgments:

1. The movant has the burden of showing there is no genuine issue of material fact and that it is therefore entitled to judgment as a matter of law.

2. In determining whether there is a material issue of fact precluding summary judgment, evidence favorable to the non-movant must be taken as true.

3. Every reasonable inference must be indulged in favor of the non-movant, and any doubt resolved in its favor. E.g., *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Text 1985); Karl v. Oaks Minor Emergency Clinic, 826 S.W.2d 791, 794 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

In her second amended motion for summary judgment, June claimed there was no genuine issue as to any material fact with regard to her claim to be Gustilo's child and heir. In support of her claim, June attached several exhibits to her motion for summary judgment: (l) a "Constancia" dated March 20, 1983, and filed with a Filipino trial court in which Gustilo acknowledged his paternity of June; (2) a final order by a Philippine trial court directing the civil registrar to amend June's birth certificate to reflect her correct name, June Salvacion G. Gustilo, and change the name of her father from Francisco J. Maravilla to Armando C. Gustilo; and (3) a sworn copy of June's birth certificate, as corrected, issued on February 12, 1985. June claims these documents prove as a

matter of law, by clear and convincing evidence, that she is the child and heir of Gustilo. As additional summary judgment proof, June included an affidavit and supplemental affidavit by Nadina wherein she swore Gustilo was June's father, and an affidavit by Maravilla wherein he swore he and Nadina were separated and had no sexual contact during the time June could have been conceived. Though all of these documents were submitted as summary judgment proof, we find that the order of the Philippine trial court standing alone was sufficient to establish that June is the child and heir of Gustilo as a matter of law.

Some years after June's birth, Nadina petitioned a Philippine trial court to amend her birth certificate. Originally, Maravilla was listed as June's father on the birth certificate. Nadina sought to change the- birth certificate to reflect that Gustilo was in fact June's father. As a part of her summary judgment evidence, June attached a properly authenticated copy of the Philippine court's final order of January 7, 1985. The order states, in pertinent part:

> **The jurisdiction of the Court having been established** with the publication of the amended petition (Exhs. "G", "G1" to "G3"), and **with the proper notice to** the Office of the Solicitor General, the Local Civil Registrar of Makati, Metro Manila, as well as **respondents Francisco J. Maravilla and Armando C. Gustilo,** this case was heard on December 6, 1984. During the hearing, nobody appeared to oppose the instant petition. **Further, respondents Francisco Maravilla and Armando C. Gustilo have filed their written conformity to this** petition (Exhs. "E", "F" and "D")....
>
> ...[P]etitioner and respondent Francisco Maravilla, Jr. ceased living together since February 1977 continuously up to the present. On June 9. 1978, petitioner delivered a baby girl named June Salvacion....[T]hrough inadvertence and/or excusable mistake, as she vas then under intense

physical discomfort, affixed her signature in the birth certificate of her daughter and unfortunately, she was not able to notice the erroneous entries supplied honestly in utmost good faith by her uncle William R. Veto, not knowing their relationship with the respondent Armando C. Gustilo, who is the father of her daughter June Salvacion.

Petitioner with all honesty and candor recognized the fact that the true and real father of June Salvacion is the respondent Armando Gustilo and not the respondent Francisco Maravilla Jr. which is appearing in the Birth Certificate of said child (Exh. "B"), considering that petitioner have [sic] no carnal relation with any other men from February 1977 and continuously up to the present except with the respondent Armando C. Gustilo....

Respondent Armando C. Gustilo had manifested through Constancia dated March 20,1983, that he is acknowledging June Salvacion as his daughter with petitioner Nadina G. Maravilla and has no objection to this petition (Exh. "D" .... [R]espondent Francisco J. Maravilla, Jr. assisted by his counsel Atty. Reynaldo C. Depasucsat had voluntarily joined petitioner in the original petition dated March 17, 1983 by signifying his written conformity with all the allegations contained therein as evidence by their signatures appearing thereto (Exhs. "E" and "F").

The petitioner clearly and sufficiently established the paternity of her daughter by the evidence of record to warrant and legally justify the necessary corrections of her daughter's certificate of birth[,] the petition is hereby granted.

WHEREFORE, judgment is hereby rendered directing the Local Civil Registrar of Makati, Metro Manila to correct the birth certificate of June Salvacion G. Maravilla to the effect that her full name appearing in Item No. 3 of the certificate of

birth be corrected to read as "June Salvacion G. Gustilo" and that the name of her father appearing thereto in Item No 7 as Francisco J. Maravilla be corrected to read as Armando C. Gustilo.... (emphasis added).

This judgment establishes that June is the daughter of Gustilo. The judgment recites that both Gustilo and Maravilla were given notice of the proceeding, and in fact, concurred in it. The effect of the Philippine judgment was a finding by a court of competent jurisdiction that June was the biological child of Gustilo.

All of the arguments and complaints raised by appellants as to the use and adequacy of the Philippine judgment as summary judgment proof constitute a collateral attack. A collateral attack on a judgment is an effort to avoid its binding force in a proceeding' instituted not for the purpose of correcting, modifying, or vacating it, but in order to: obtain specific relief against which the judgment stands as a bar. Biaza v. Simon, 879 S.W 2d 349, 353 (Tex. App.—Houston [14th Dist] 1994, writ denied). In other words, it is an attempt to impeach a judgment offered as evidence of some right. *Jefferson Sav. & Loan Ass tn v. Adams,* 801 S.W.2d 811, 814 (Text App.—San Antonio 1990, writ denied). **It is an attack** made by, or in, an action or proceeding that has an independent purpose, i.e., a purpose other than impeaching or overturning the judgment. *Id* Here, appellants' suit was brought to obtain a determination of Gustilo's heirs by a Texas court, and to attempt to set aside the settlement agreements made by Nadina and appellants in the Philippines. The instant suit was not a suit to relitigate the paternity finding.

Unless a judgment of a court of general jurisdiction is void, it is not subject to collateral attack in another court of equal jurisdiction. *Browning v. Placke,* 798 S.W.2d 362, 363 (Tex. 1985). A judgment is void when the court lacked: (1) jurisdiction of the parties or property; (2) jurisdiction of the subject matter; (3) jurisdiction to enter the particular

judgment; or (4) the capacity to act as a court. *Bakali v. Bakali,* 830 S.W.2d 251, 254 (Text App.—Dallas 1992, no writ). All errors, other than jurisdictional deficiencies, render a judgment merely voidable, and such errors must be corrected on direct attack. *Id.*

The Philippine judgment recites that it has jurisdiction of the subject matter and appellants do not attack the court's jurisdiction. Instead, they attempt to impeach the judgment and defeat June's motion for summary judgment by filing affidavits that attempt to show Maravilla had access to Nadina around the time of conception. This is nothing more than an improper collateral attack. We hold the Philippine judgment is sufficient summary judgment proof to support the trial court's finding that June was the daughter and heir of Gustilo.[5] Appellants' second point of error is overruled.

3. ARTICLE 352 OF TEXAS PROBATE CODE

In their third point of error, appellants claim the probate court erred by "refusing to carry out statutory mandate provided under Article 352 of the Texas Probate Code." Appellants contend the probate court was required to declare the Compromise Agreements between Nadina and appellants void based on article 352.

Article 352 provides that except under certain specified circumstances "the personal representative of an estate shall not become the purchaser, directly or indirectly, of any property of the estate sold by him, or by any co-representative if one be acting. TEX. PROB. CODE ANN. art. 352 (Vernon Supp. 1995). There is nothing in the record to show that Nadina, as the personal representative, ever attempted to, or

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[5] Because we find the Philippine judgment is sufficient summary judgment proof, we do not need to address each of appellant's fifteen subpoints to point of error two.

in fact purchased, any Estate property. The Compromise Agreements merely attempted to settle the Estate; the agreements did not involve a "purchase." Article 352 is inapplicable and appellants' third point of error is overruled.

4. THE JUDGMENT OF THE PHILIPPINE APPELLATE COURT

In point of error four, appellants claim the probate court erred by refusing to recognize the judgment and opinion of the Seventh Court of Appeals of the Republic of the Philippines. Appellants claim the Philippine decision must be recognized because it is (1) res judicata as to the invalidity of the Compromise Agreements; and (2) the law of the case. After Jose and Mary executed the Compromise Agreements, the agreements were brought before a Philippine trial court for approval and were approved on March 1, 1988. Several months after entering into the agreements with Nadina, Jose and Mary fled motions asking the Philippine court to reconsider its order of March 1, 1988, approving the agreements. These motions alleged the compromise agreements were obtained through fraud and mistake, due to alleged fraudulent concealment by Nadina. Jose and Mary claimed Nadina had misrepresented the size and value of the Estate in order to get them to settle for less than they were actually due.

While the motions for reconsideration were still pending in the Philippine trial court, Jose and Mary filed this suit in the Texas probate court. While the case was pending in the Texas probate court, the Philippine trial court denied appellants' motions for reconsideration. This order was entered April 6, 1992. Appellants then filed a petition for certiorari with the Seventh Division of the Philippine appellate court. In February of 1993, the Philippine appellate court found the Philippine trial court committed a "grave abuse" of discretion when it denied the motions for reconsideration, and found the March 1, 1988, and the April 6, 1992, orders were

"null and void ab initio" and ordered them set aside. The Philippine trial court was ordered to: (l) continue with the proceedings for appointment of an administrator; (2) determine the relationship of Nadina and June to Gustilo; (3) resolve all other pending matters related to the Estate; and (4) close the administration of the Estate by proper declaration of heirs and distribution.

After Nadina became aware of the decision of the Philippine appellate court, she filed a motion for reconsideration. That motion was ultimately denied and the case was appealed to the supreme court of the Philippines. On January 25, 1994, the Philippine supreme court affirmed the decision of the appellate court. The supreme court's decision was issued more than five months after final judgment was rendered in this case.

—The prerequisites for the application of the doctrine of res judicata are: (1) the prior judgment was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties, or those in privily with them, are identical in both suits; and (4) the same cause of action is involved in both suits. *Gorelick v. Harrison County,* 720 S.W.2d 835, 836 (Tex App.—Texarkana 1986, no writ). For the doctrine to apply, there must be an existing final judgment by a court of competent jurisdiction. *Turner v. City of Carrollton Civil Serv. Comm'n,* 884 S.W.2d 889, 894 (Tex.App.— Amarillo 1994, no writ).

During the trial of this case, and at the time appellants requested the court notice the foreign judgment and accept it as res judicata, the Philippine judgment was not final. The Philippine judgment did not become final until at least January of 1994 when the supreme court issued its decision. Therefore, the doctrine of res judicata was inapplicable and the trial court did not err in refusing to recognize the Philippine appellate court decision.

Appellants also claim the trial court should have recognized the Philippine appellate decision as law of the case. The doctrine of the law of the case is defined as that principle under which the determination of questions of law will generally be held to govern the case throughout all of its subsequent stages where such a determination *has already been made on a prior appeal to a court of last resort. Kropp v. Prather, 526* S.W.2d 283, 285 (Text Civ. App --Tyler 1975, writ refd n.r.e.) (emphasis added).

Here, at the time appellants were claiming the doctrine applied, a determination regarding the validity of the Compromise Agreements had not been made to a court of last resort Le Philippine supreme court was the court of last resort and its decision did not issue until five months after judgment had been entered in the Texas suit. Thus, the doctrine is inapplicable and the trial court did not err in refusing to apply it. Appellants' fourth point of error is overruled.[6]

In connection with this point of error, appellants filed a motion with this court asking us to "give full recognition" under section 36 of the Texas Civil Practice and Remedies Code to the decisions of the appellate and supreme court of the Philippines, and upon doing so, enforce those

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[6] Appellants' attempted use of the doctrines of res judicata and law of the case is an attempt to have two bites at the same apple. Initially, appellants lost their argument concerning the Compromise Agreements in the Philippine court. While that case was under reconsideration in the Philippines, they filed suit in Houston essentially making the same claim: the Compromise Agreements were void because of the fraudulent actions of Nadina. When they learned their argument had been accepted by the Philippine appellate court. They attempted to use that decision as a bar in the Houston court. Now, unhappy with the outcome of their case in Houston, they want to rely on the Philippine court's decision. Appellants had the option of not filing suit in Houston, or filing for a stay under section 36.007 of the Texas Civil Practice and Remedies Code. They chose neither avenue and cannot now complain because they did not prevail in Texas.

decisions by setting aside all the jury findings relating to the agreements between Nadina and appellants.[7]

Section 36.001 of the Code defines a "foreign country judgment" as a judgment of a foreign country granting or denying a sum of money other than a judgment for: (1) taxes, fines, or other penalties; or (2) support in a matrimonial or family matter. TEX. CIV. PRAC. & REM. CODE ANN. 36.001(2) (demon 1986). The Philippine judgments that appellants want this court to recognize and enforce are not judgments "granting or denying a sum of money." Therefore, they are not "foreign county judgments." We hold section 36 is inapplicable and deny appellants' motion and request.

5. TESTIMONY OF JAY REA

In their fifth point of error, appellants contend the trial court erred in (1) allowing the testimony of Jay Rea (Rea) into evidence, and (2) allowing exhibits prepared by Rea into evidence Appellants essentially contend Rea's testimony was inadmissible because he was not qualified as an expert and his testimony was based on inadmissible hearsay.

Rea was called as an expert witness by June to rebut appellants' evidence that they did not receive a fair share of

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[7] In their motion and notice, appellants also seek recognition of the Philippine decisions under section 3' of the Texas Civil Practice and Remedies Code. However, section 35 is based on the full faith and credit clause of the United States Constitution. *See Stine v. Koga*, 790 S.W.2d 412, 414 (Text App.—Amarillo 1990, writ dism'd by agreement). The full faith and credit clause of the United States Constitution states that full faith and credit shall be given in each state to the judicial proceedings of every other state. U. S. CONST. art. IV, 1 (emphasis added). Thus, section 35 of the Texas Civil Practice and Remedies Code applies to court decisions from other states, not other countries. In fact, the title of section 35 is "Enforcement of Judgments of Other States." TEX. CIV. PRAC. & REM. CODE ANN. 35.001 et seq. (Vernon Supp. 1995).

the Estate. Rea's testimony concerned the after-tax value of the Estate and the amount available for distribution.

A witness is qualified as an expert based on his knowledge, skill, experience, training, or education. TEX. R. CIV. EVID. 702. A party who offers an expert's opinion has the burden to show the witness is qualified; specifically, they must show the proffered expert possesses a higher degree of knowledge than an ordinary person or the trier of fact. *ITT Commercial Finance Corp. v. Riehn*, 796 S.W.2d 248, 250 (Text App.—Dallas 1990, no writ). Whether a witness qualifies as an expert is within the trial court's discretion and will be reversed only for an abuse of that discretion. *Harris County Hosp. Dist. v. Estrada*, 872 S.W.2d 759, 762 (Text App.—Houston [1st Dist.] 1993, writ denied).

Rea, a partner with the international accounting firm of Price-Waterhouse, testified he had been with the firm for twelve years. He stated that for the past six or seven years he directed the "individual financial services group" that does "comprehensive, multi-discipline estate. income, investment planning for high net worth individuals" and is considered to be the firm's expert in the area of high net worth estate and tax issues. He testified he has a number of clients who are U.S. citizens living abroad, and foreign citizens living in the U.S. Rea's curriculum vitae was admitted into evidence. This shows he frequently speaks on tax and financial topics and has presented over 200 financial planning workshops for Price-Waterhouse clients.

On cross-examination, appellants elicited testimony that Rea was not an expert in Philippine taxation; however, Rea responded that certain members of his firm with whom he consulted are experts in this area. He admitted he had not handled a "death tax calculation" case prior to this one, but one of his colleagues with whom he consulted handled death tax calculations for major estates on a daily basis.

The record shows Rea possessed a higher degree of knowledge than the ordinary person. and, therefore, the threshold requirement for the presentation of a supposed expert's opinion was satisfied. *See Riehn, 796* S.W.2d at 250. After the threshold is met, weight and **credibility determinations fall within the province of the jury.** *Id*

Appellants also complain that all of Rea's testimony was based on hearsay, and was therefore inadmissible. We disagree. First, appellants have wholly failed to point this court to the statements or documents they consider hearsay. Second, we have reviewed the record and not all of the testimony relied on by Rea was hearsay. Finally, if the facts or data relied on by the expert are of a type reasonably relied upon by experts in the field in forming opinions on the subject, the facts or data do not have to be admissible in evidence. TEX. R. CTV. EVID. 703. The record shows the data and facts relied upon by Rea, e.g., estate tax forms and accountings filed by the administrators, are clearly the type of data upon which experts in the field would rely in forming opinions on the subject.

We conclude the trial court did not abuse its discretion in admitting either Rea's testimony or the exhibits prepared by Real Appellants' fifth point of error is overruled.

6. CUMULATIVE ERROR

In their sixth point of error, appellants claim the "cumulative effect" of the errors committed by the probate court and the conduct of the trial in general, resulted in an unfair trial and prejudice to appellants. Under this point, appellants have fifteen sub-points which list specific errors allegedly committed by the trial court. The alleged errors range from complaints about discovery and discovery sanctions to error in the jury charge.

While briefing requirements and the rules relating to the presentation of points of error and argument are to be liberally construed, the purpose of briefs is to acquaint the court with the points relied on and provide such argument as will enable the court to decide the case. TEX. R. APP. P. 74(p). This court may disregard an assignment of error which is multifarious. Pooser v. Lovett Square Townhomes, 702 S.W.2d 226 (Text App.—Houston [1st Dist.] 1985, writ refd n.r.e.). This "point of error" does not sufficiently direct the attention of the court to the error about which the complaint is made; nor are these numerous alleged errors supported by sufficient argument *See* TEX. R APP. P. 74(d).

While rule 74(p) states an appellate court may order rebriefing for a flagrant violation of this rule, the court is not required to do so. *Fredonia State Bank v. American Life Ins., 881* S.W.2d 279 284 (Text 1994). In this case, we find appellants' point of error to be multifarious and decline to order rebriefing. Appellants' sixth point of error is overruled.

7. DAMAGE CLAIMS AND THE DIRECTED VERDICT

At the conclusion of appellants' case in chief, June moved for and was granted a directed verdict on appellants' claims for damages arising out of Nadina's alleged fraud in connection with the settlement in the Philippines. In their seventh point of error, appellants allege (1) the trial court erred in allowing appellants' damage claims to be tried because it was appellants' understanding that the damage issues would not be tried and (2) the trial court erred in granting the motion for directed verdict because appellants made a prima facie case for damages based on fraud. Appellants' confusion regarding whether their claim for damages would be tried apparently stems from the fact that another case involving the Gustilo estate was pending before the same probate court at the time the instant case went to trial. The other lawsuit was brought by the Kanaly Trust Company, as successor administrator of the Estate, against Nadina. her bonding company, Mary, and

Jose. The case brought by Kanaly Trust was given cause number 214.659-405 and was referred to on the record as the "405 case." In the "405 case." the issues concerned whether Nadina, in her capacity as administratrix of the Estate, properly accounted for all estate assets, breached her fiduciary duty, or converted estate assets. There were no specific allegations in the "405 case" alleging fraud in connection with the settlement in the Philippines.

The pleadings fled by appellants in this case contained many allegations similar to those made in the "405 case" by Kanaly Trust Specifically, there was a cross-claim against Nadina alleging breach of fiduciary duly and fraud arising out of her actions as administratrix. Thus, the probate court was confronted with a situation where some issues in the instant case overlapped issues raised by Kanaly Trust in the "405 case."

On April 5, 1993, the day before trial began, counsel for appellants asked the court for "some guidance" concerning the cross-action against Nadina "based on the identical issues -- not identically but substantially the same issues of fraud, breach of fiduciary duty [as those raised by Kanaly Trust in the "405 case]." The court responded: "It is my understanding that we are trying whether Nadina is an heir and whether the Settlement Agreement barred your clients." Appellants' counsel told the court it was their position that the settlement agreements were procured by fraud and wondered how that issue was to be handled. The probate court told appellants' counsel that if they were going to use the fraud allegation to defeat the settlement agreements then that would be part of the case.

The next day, before voir dire began, appellants' counsel objected to "trying the issue of fraud if indeed they will be given any issue preclusion of fact when we try the same issue for damages." In response to the objection, the court stated: *"Counsel, what I intend to hear is the fraud that related to the*

settlement in the Philippines. I don't intend to hear any evidence about what has happened in the administration of the estate after it got started." The court clearly ruled tl ~ at all issues relevant to the settlement agreements were to be tried in the instant case and that any issues relating to Nadina's administration of the Estate would be tried in the "405 case." Therefore, prior to the beginning of voir dire, appellants were on notice that any claim of fraud related to the settlement agreements would be tried to the jury.

Appellants also contend the trial court erred in granting the directed verdict because they established a prima facie case for damages. In reviewing the granting of a directed or instructed verdict by the trial court on an evidentiary basis, the reviewing court must determine whether there is any evidence of probative force to raise fact issues on the material questions presented. *Collora v. Navarro,* 574 S.W.2d 65, 68 (Tex 1978). The appellate court considers all of the evidence in the light most favorable to the party against whom the verdict was instructed and disregards all contrary evidence and inferences. *Id.* Every reasonable inference deductible from the evidence must be indulged in favor of the non-movant. *Id.* If there is any conflicting evidence of probative force, the issue is for the jury and an instructed verdict is improper. *Id.* However, when there is no evidence of probative force on an ultimate fact issue, or the probative force of the evidence is so weak that only a mere surmise or suspicion is raised, the trial court has the duty to instruct or direct the verdict. *Porterfield v. Brinegar, 719* S.W.2d 558, 559 (Text 1986).

When June moved for an instructed verdict, her attorney argued appellants had failed to prove the essential elements of fraud. Specifically, June's attorney argued there was no evidence that any misrepresentations were made, that they were relied on by appellants to their detriment, or that damage resulted. In responding to the motion, appellants' counsel conceded on the record that there was no evidence of reliance. A party may not urge on appeal that which was conceded at

trial. *Buck v. Rogers, 709* S.W.2d 283, 287 (Text App—Corpus Christi 1986, no writ). Thus, appellants cannot now claim they presented evidence on the fraud issue when their attorney conceded that they failed to prove an essential element.

Nevertheless, even if we address appellants' contention and review the evidence under the required standard of review, appellants' argument fails. We have reviewed the entire record. and considering the evidence in the light most favorable to appellants, we find the trial court did not err in granting June's motion for instructed verdict. Appellants did not provide evidence on each element of their fraud claim. Appellants' seventh point of error is overruled.

CONCLUSION

We overrule all of appellants' points of error and affirm the judgment of the trial court.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed July 3, 1996. Panel consists of Justices Yates, Fowler. and Oneill.
Do Not Publish - TEX. R. APP. P. 90.

APPENDIX E

(Notice from Fourteenth Court of Appeals
that Motion for Rehearing and Motion for
Rehearing En Banc Denied)

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

August 15, 1996

Re: Case No. 14-93-00941-CV

Style: Gustilo, Mary Joy Ann, a Minor child, by and through her Guardia [sic] v. Gustilo, Nadina G., Et Al

Dear Counsel:

Please be advised that on this date the court overruled the appellants motion for rehearing. Further, application for writ of error, if any, must be submitted on or before Monday, September 16, 1996.

Charlene Mitchell,
Chief Deputy Clerk

August 15, 1996

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

Re: Case No. 14-93-00941-CV

Style: Gustilo, Mary Joy Ann, a Minor child, by and through her Guardia [sic] v. Gustilo, Nadina G., Et Al

Dear Counsel:

Please be advised that on this date the court overruled Mary Joy and Jose Vicente Gustilo's Motion for En Banc Consideration in the above cause.

Charlene Mitchell,
Chief Deputy Clerk

APPENDIX F

[Excepts from: *Arsenal v. Intermediate Appellate Court*, 186 Philippine Supreme Court, Lexus 2709 (July 14, 1986)]

FRANCISCA ARSENAL and REMEDIO ARSENAL, petitioners, vs. THE INTERMEDIATE APPELLATE COURT, HEIRS OF TORCUATO SURALTA, and SPOUSES FILOMENO PALAOS and MAHINA LAGWAS, respondents

GUTIERREZ, JR., J.:

. . .

[Text Omitted]

On March 6, 1974, Torcuato Suralta filed a case against Filomeno Palaos, Mahina Lagwas, Francisca Arsenal, Remedio Arsenal and the Register of Deeds of Bukidnon for the annulment of Transfer Certificate of Title No. T-7879 issued to the Arsenals insofar as it covers the four-hectare portion previously sold to him.

In answer to the complaint, the Arsenals denied previous knowledge of the sale to Suralta of the land in question. As a special defense, they assailed the validity of the purchase by Suralta in 1957, pointing to the prohibition contained [*6] in the Public Land Law against its disposal within the period of five years form the issuance of the homestead patent. They also questioned the legality of the sale made to Suralta in 1957 by Filomeno Palaos and Mahina Lagwas for not having been approved by the Commission on National Integration despite the fact that Palaos and his wife belong to the cultural minorities,1 are illiterates, and do not understand the English language in which the deed of sale in favor of Suralta was written.

In their answer, the spouses Filomeno Palaos and Mahina Lagwas sustained the sale made by them to Suralta. They

alleged that they verbally sold one hectare to one Tiburcio Tadena and sold the remaining 3.7829 hectares to the Arsenals. They stated that they informed the Arsenals about the previous sale of four hectares to Suralta. They also claimed that the Arsenals took undue advantage of their ignorance and illiteracy and caused them to sign the document of sale to as to include the entire 87,829 sq. m. covered by their original title.

On May 4, 1976, the trial court rendered judgment in favor of Suralta. It imputed bad faith to the Arsenals and declared them disqualified to avail of the protection [*7] afforded by the provisions of the Civil Code to innocent purchasers although they registered their purchase ahead of Suralta.

The court held that:

xxx xxx xxx [sic]

"The defendants Arsenal could not also avail of the prohibition in the Public Land Act against the disposal of any land granted to a citizen under that law because the benefit of said prohibition does not inure to any third party. Only the government could have filed the adequate proceedings for confiscation of the land for violation of the condition of the grant by Palaos. Moreover, a verbal sale of land is valid and effective as between the parties to the agreement and Filomeno Palaos had reaffirmed the sale he made in favor of the plaintiff in 1957 by executing another instrument in 1973 to cure whatever defects which may have affected their formal contract.

"Likewise, Francisca Arsenal cannot take advantage of the lack of approval by the commission on National Integration of the sale made by Filomeno Palaos in favor of plaintiff Torcuato Suralta. Only the latter, in whose favor the protection is afforded, could contest the document on the

ground, as Francisca Arsenal was not a party to said contract and even if she is [*8][also a member of the cultural minority for being only half a native of Bukidnon because she and her husband who is from Cebu are both literates."

. . .

[Text Omitted]

In resisting respondent Suralta's claim, the petitioners rely heavily on the nullity of the contract of sale executed in 1957 between the respondents Palaos and Suralta. They allege that because the previous sale was void from the beginning, it cannot be ratified and "No amount of bad faith on the part of the petitioners could [*10] make it valid and enforceable in the courts of law."

These arguments are impressed with permit.

The law on the matter which is the Public Land Act (Commonwealth Act No. 141, as amended) provides:

"Sec. 118. Except in favor, of the Government or any of its branches, units or institutions, lands acquired under free patent or homestead provisions shall not be subject to encumbrance or alienation from the date of the approval of the application and for a term of vive years form and after the date of issuance of the patent or grant nor shall they become liable to the satisfaction of any debt contracted prior to the expiration of said period, but the improvements or crops on the land may be mortgaged or pledged to qualified persons, associations, or corporations.

"No alienation, transfer, or conveyance of any homestead after five years and before twenty-five years after issuance of title shall be valid without the approval of the Secretary of Agriculture and Natural Resources, which approval shall not be denied except on constitutional and legal ground (As amended by Cocm. Act. No. 456, approved June 8, 1939).

xxx xxx xxx [sic]

"Sec. 120. Conveyance and encumbrance made [*11] by persons belonging to the so-called 'non-Christian Filipinos' or national cultural minorities, when proper, shall be valid if the person making the conveyance or encumbrance is able to read and can understand the language in which the instrument or conveyance or encumbrance is written. Conveyances and encumbrances made by illiterate non-Christians or literate non-Christians where the instrument of conveyance is in a language not understood by the said literate non-Christian shall not be valid unless duly approved by the Chairman of the Commission on National Integration. (As amended by Rep. Act No. 3872, approved June 18, 1964).

xxx xxx xxx [sic]

"Sec. 124. Any acquisition, conveyance, alienation, transfer, or other contract made or executed in violation of any of the provisions of sections one hundred and eighteen, one hundred and twenty, one hundred and twenty-one, one hundred and twenty-two, and one hundred twenty-three of this Act shall be unlawful and null and void from its execution and shall produce the effect of annulling and cancelling the grant, title, patent, or permit originally issued, recognized or confirmed, actually or presumptively, and cause the [*12] reversion of the property and its improvements to the State."

The above provisions of law are clear and explicit. A contract which purports of alienate, transfer, convey or encumber any homestead within the prohibitory period of five years form the date of the issuance of the patent is void from its execution. In a number of cases, this Court has held that such provision is mandatory (*De los Santos v. Roman Catholic Church of Midsayap*, 94 Phil. 405).

Under the provisions of the Civil Code, a void contract is inexistent from the beginning. It cannot be ratified neither can

the right to set up the defense of its illegality be waived. (Art. 1409, Civil Code).

To further distinguish this contract from the other kinds of contract, a commentator has stated that:

"The right to set up the nullity of a void or non-existent contract is not limited to the parties as in the case of annullable or voidable contracts, it is extended to third persons who are directed affected by the contract." (Tolentino, Civil Code of the Philippines, Vol. IV, p.6054, [1973]).

"Any person may invoke the inexistence of the contract whenever juridical effects founded thereon are asserted [*13] against him." (Id. p. 595).

. . .

[Text Omitted]

". . . . This execution of the formal deed after the expiration of the prohibitory period did not and could not legalize a contract that was void from its inception. Nor was this formal deed of sale 'a totally distinct transaction from the promissory note and the deed of mortgage', as found by the Court of appeals, for it was executed only in compliance and fulfillment of the vendor's previous promises, under the perfected sale of January 4, 1938, to execute in favor of his vendee the formal act of conveyance after the lapse of the period of inhibition of five years from the date of the homestead patent. What is more, the execution of the formal deed of conveyance was postponed by the parties precisely to circumvent the legal prohibition of their sale.

. . .

[Text Omitted]

At first blush, the equities of the case seem to lean in favor of the respondent Suralta who, since 1957, has been in

possession of the land which was almost acquired in an underhanded manner by the petitioners. We cannot, however, gloss over the fact that the respondent Suralta was himself guilty of transgressing the law by entering, in 1957, into a transaction clearly prohibited [*20] by law. It is a long standing principle that equity follows the law. Courts exercising equity jurisdiction are bound by rules of law and have no arbitrary discretion to disregard them. Equitable reasons will not control against any well-settled rule of law or public policy (*McCurdy v. County of Shiawassee*, 118 N.W. 625). thus, equity cannot give validity to a void contract. It, on the basis of equity, we uphold the respondent Suralta's claim over the land which is anchored on the contracts previously executed we would in effect be giving life to a void contract.

. . .

[Text Omitted]

We see, however, a distinguishing factor in this case that sets it apart from the above cases. The original owners in this case, the respondent Palaos and his wife, have never disaffirmed the contracts executed between them and the respondent Suralta. More than that, they expressly sustained the title of the latter in court and failed to show any interest in recovering the land. Nonetheless, we apply our earlier rulings because we believe that as in pari delicto may not be invoked to defeat the policy of the State neither may the doctrine of estoppel give a validating effect to a void contract. Indeed, it is generally considered that a _____ between parties to a contract, validity cannot be given to it by estoppel if it is prohibited by law or is against public policy (19 Am. Jr. 802). It is not within the competence of any citizen to barter away what public policy by law seeks to preserve (*Gonzalo Puyat & Sons, Inc. v. De los Amas and Alino*, *supra*). Of course, this pronouncement covers only the previous transactions between the respondents. [*23] We cannot pass upon any new contract, between the same parties

involving the same land if this is their clear intention. Any new transaction, however, would be subject to whatever steps the Government may take for the reversion of the property to it.

With the resolution of the principal issues and in view of our own conclusions of facts and law, we hold untenable the lower court's award of moral damages, attorney's fees and litigation expenses.

WHEREFORE, the decision of the Intermediate Appellate Court is REVERSED and SET ASIDE. Judgment is hereby rendered:

(a) Declaring null and void the sale of the four-hectare portion of the homestead to respondent Torcuato Suralta and his heirs;

(b) Declaring null and void the sale of the same portion of land to the petitioners Francisca Arsenal and Remedio Arsenal;

(c) Ordering the Register of Deeds of Bukidnon to cancel Transfer Certificate of Title No. T-7879 as to the disputed four-hectare portion and to reissue an Original Certificate of Title for the portion designated as Lot 81-A of the Subdivision Plan LRC-PLD-198451 prepared by Geodetic Engineer Donito P. Balbuena and approved by the Commission on Land Registration, in favor [*24] of the respondents Filomeno Palaos and Mahina Lagwas;

(d) Ordering the respondents Filomeno Palaos and Mahina Lagwas to reimburse the heirs of the respondent Torcuato Suralta the sum of EIGHT HUNDRED NINETY PESOS (P890.00), the price of the sale. The value of any improvements made on the land the interests on the purchase price are compensated by the fruits the respondent Suralta and his heirs received from their long possession of the homestead.

This judgment is without prejudice to any appropriate action the Government may take against the respondents Filomeno Palaos and Mahina Lagwas pursuant to Section 124 of Commonwealth Act No. 141, as amended.

SO ORDERED.

Feria (Chairman), Fernan, Alampay and Paras, JJ., concur.

APPENDIX G

[Note - Duplicate of Exhibit "B"]

(Notice from Texas Supreme Court that
Motion for Rehearing of Writ of Error Overruled)

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

April 18, 1997

Mr. Raymond M. Hill
Raymond M. Hill & Associates
2650 Fountainview, Suite 416
Houston, TX 77057

Mr. Joseph S. Horrigan
Horrigan & Goehrs
1000 Two Houston Center
909 Fannin
Houston, TX 77010-1003

Mr. Kelly D. Stephens
Kelly D. Stephens & Associatse
8955 Katy Freeway, Suite 202
Houston, TX 77024

Mr. John W. Porter
Baker & Botts
3000 One Shell Plaza
910 Louisiana
Houston, TX 7002-4995

Mr. William S. Hart
Hart & Associates
2650 Fountainview, Suite 416
Houston, Texas 77057

RE: Case Number 96-0843
Style: MARY JOY ANN GUSTILO and JOSE VICENTE GUSTILO, III v. NADINA (MARAVILLA) GUSTILO, individually and as former administratrix of the estate of ARMANDO C. GUSTILO, deceased, et al.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error, as amended, in the above styled case. Motion for leave to file appendix and corrections was granted. Petition to publish court of appeals opinion, pursuant to Rule90(c), Texas Rules of Appellate Procedure, was denied. Motion for assessment of damages for delay was overruled. Motion to strike amended motion for rehearing was overruled.

Sincerely,

John T. Adams, Clerk

by_____
Michael C. Murphey, Deputy

cc: Ms. Mary Jane Smart, Clerk

APPENDIX H

(Excerpts from The International Covenant
on Civil and Political Rights)

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

. . .

[Text Omitted]

(5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 27 are not self-executing.

APPENDIX I

(Excerpts from opinion of Philippine Court of Appeals, *Gustilo v. Agdamag*, G.R. Sp. No. 28626)

Republic of the Philippines
COURT OF APPEALS
Manila

SEVENTH DIVISION

JOSE VICENTE GUSTILO III, Petitioner, - versus - HON. FERNANDO P. AGDAMAG, Presiding Judge, Branch 138, Regional Trial Court, National Capital Judicial Region, Makati, Metro Manila, NADINA G. GUSTILO, and JUNE SALVACION GUSTILO, represented by her mother and judicial Guardian NADINA G. GUSTILO, Respondents.	CA-G.R. SP. NO. 28626 Members: DE PANO, JR. LAPEMA, JR. AUSTRIA-MARTINEZ

--

DECISION

AUSTRIA-MARTINEZ, M.A., J.:

Petition for certiorari filed by Jose Vicente Gustilo III against the Presiding Judge of Branch 138, Regional Trial

Court of Makati, Nadina Gustilo and minor June Salvacion Gustilo, represented by her mother and judicial guardian Nadina Gustilo, praying that judgment be rendered (1) annulling and setting aside the Order dated March 1, 1988 approving the compromise agreement entered into by and between herein petitioner and private respondents; and the Order dated April 6, 192 denying petitioner's motion for reconsideration: (2) revoking and/or setting aside the appointment of private respondent Nadina as judicial administratrix of the Intestate Estate of the deceased Armando C. Gustilo; and (3) ordering respondent court to continue with the proceedings for the appointment of a judicial administrator and all pending incidents and thereafter to close the administration of the estate of the deceased by the proper declaration of heirs and distribution of the shares of each heir.

Private respondents filed their comment; petition his reply; and the former, their rejoinder.

Stripped of non-essentials, the antecedent facts of the case are as follows: On February 5, 19878, minor Mary Joy Anne Gustilo through her mother Milagros M. Barco filed a petition for letters of Administration re: Intestate Estate of Armando C. Gustilo. praying that the deceased's brother Vicente C. Gustilo, Jr. be appointed as administrator of the estate (Annex C, Petition). On February 17, 1987, herein petitioner, as the son of said decedent joined his sister Mary Joy Anne in her petition to appoint their uncle Vicente to be appointed as administrator of the estate of their deceased father (Annex D, Id.). Claiming to be the surviving spouse and daughter of the deceased, Nadina G. Gustilo and June Salvacion G. Gustilo opposed the said petition (Annex H, id.)

On August 13, 1987, Mary Joy Anne through her mother and guardian ad litem Milagros Barco and herein private respondents Nadina and June Salvacion filed a Joint Petition for Appointment of Nadina as Administratrix and for approval of the compromise agreement by and between them as well as

the waiver and renunciation of Mary Joy Anne's right to inherit from the deceased Armando C. Gustilo in favor of her co-heirs Nadina and June Salvacion (Annex I, id.)

On August 13, 1987, herein petitioner filed an opposition thereto questioning the alleged marriage of Nadina to his deceased father and the filiation of June Salvacion whose birth certificate shows that she is the daughter of Nadina and a certain Francisco Maravilla, Jr., and, praying that he be appointed as the administrator of the estate of his deceased father, he being the oldest legitimate heir (Annex J, id.)

On February 24, 1988, petitioner and herein private respondents assisted by counsel, entered into a compromise agreement covering the properties petitioner would have received form the estate of the decedent (par. 11, Petition).

On March 1, 1988, respondent court approved both compromise agreements (Annex A, id.)

On May 28, 1988, Mary Joy Anne through her mother filed a motion for reconsideration of the said Order of March 1, 1988. (marked as Annex M, p. 132, Rollo) which motion was amended on April 4, 1988 (marked as Annex D, id., p. 152). On July 18, 988, petitioner filed a Supplement to Motion for Reconsideration (marked as Annex S, id., p. 179). Both motions for reconsideration allege that the compromise agreements are contrary to law and public policy and, that the consent of both Mary Joy Anne and herein petitioner were obtained through fraud and mistake due to alleged fraudulent concealment by private respondent nadina of the other valuable properties of the deceased Armando Gustilo.

Private respondents opposed said motions.

On April 6, 1992, respondent court denied the motions for reconsideration on the principal ground that the court [??] a quo has no jurisdiction to set aside its Order dated March 1,

1988 (Annex B, id.) which had already become final and executory.

Hence, the present petition for certiorari, petitioner claiming that respondent Judge acted in excess of jurisdiction with grave abuse of discretion in issuing the assailed orders (Annexes A and B) on the following grounds:

. . .

[Text Omitted]

Did the respondent court commit grave abuse of discretion in excess of jurisdiction when it approved the compromise agreement, subject matter of herein petition for certiorari? The answer is in the affirmative.

Under Article 2035 of the new Civil Code, to wit:

> "ART. 2035. No compromise upon the following questions shall be valid:
>
> "(1) The civil status of persons;
>
> "(2) The validity of a marriage or a legal separation;
>
> "(3) Any ground for legal separation;
>
> "(4) Future support;
>
> "(5) The jurisdiction of courts;
>
> "(6) Future legitime."

The civil status of minor June Salvacion and the validity/invalidity or existence of the marriage between Nadina and the deceased cannot be compromised. As can be gathered from the pleadings filed in the present petition for certiorari,

the marriage of private complainant Nadina with the deceased Armando C. Gustilo has been put in issue before the compromise agreement was entered into; that the filiation of private respondent June Salvacion was seriously raised considering that her birth certificate evidently shows that she is the daughter of private respondent Nadina and one Francisco Maravilla, Jr., June Salvacion having been born on June 7, 1978 (Annex 2, p. 275 Records) or almost seven (7) years before her mother's marriage to Maravilla was allegedly annulled. Private respondent claims that her marriage to Maravilla was annulled on March 12, 1985 and that she married the now deceased Armando C. Gustilo in August, 1982, or almost three years before her marriage to Maravilla was supposed to have been annulled; in which case, her status and that of June Salvacion with respect to the deceased Gustilo are highly questionable. These are issues that cannot be the subject of a compromise under the Civil Code. The compromise entered into by and between private respondents and Mary Joy Anne on the one hand, and, the compromise entered into by and between private respondents and petitioner on the other hand, were both in consideration of the valuable property or cash received by them. The law prohibits a compromise on civil status where the recognition of the status is in consideration of some price, prestation or concession by the other party (Tolentino, Civil Code of the Philippines Vol. V, 1992, pl. 490) which is what actually happened in this case. Likewise, in case of compromise on the validity of a marriage which gives rise to absolute nullity such as bigamy, the compromise is void (Tolentino, id. pp. 490-491).

. . .

[Text Omitted]

Generally, a petition for certiorari will not lie where there is an appeal or other adequate remedy in the ordinary course of law available to the petitioner; that a compromise agreement is immediately final and executory. However, the compromise agreement being null and void ab initio, it could

never become final and executory. There is no laches or even finality of the order to speak of (Wong v. Intermediate Appellate Court, 200 SCRA 792).

It was therefore grave abuse of discretion on the part of respondent ;judge to deny petitioner;'s motion for reconsideration on the ground that the compromise agreements have already become final and executory.

We find the prayer of the petition for revocation of the letters of administration issued to private respondent Nadina by virtue of the aforesaid compromise agreement entered into between private respondents and petitioner to be meritorious. The approval of the compromise agreements being null and void ab initio, necessarily the issuance of letters of administration in favor of private respondent Nadina is likewise null and void. The granting of the letters of administration in favor of private respondent Nadina was merely based on the misguided recommendations of petitioner and Mary Joy Anne in the compromise agreements signed by them. The respondent court did not receive evidence as to the suitableness of Nadina to act as administrator. Where an appellant asks for letters of administration on the theory that she is preferred because of her relationship to the deceased, the court necessarily has to pass first on the truth of her claim or relationship to be able to appoint an administrator in accordance with the order of preference (Martin, Rules of Court in the Philippines with Notes and Comments, Vol. 3, Third Edition, 1981 edition p. 542).

WHEREFORE, the Orders dated March 1, 1988 and April 6, 1992 issued by respondent court in Sp. Proc. No. H-1312 being null and void ab initio are hereby SET ASIDE in its entirety. As prayed for, respondent court is ordered to continue with the proceedings for appointment of a judicial administrator; to determine the relationship of private respondents Nadina G. Gustilo and June Salvacion Gustilo to the deceased Armando C. Gustilo after proper hearing, and

resolve all other pending incidents including claims of creditors, and payments of just debts, if there be any; and thereafter to close the administration of the Estate by the proper declaration of heirs and distribution o the respective shares of each heir, in accordance with Section 1, Rule 90 of the Revised Rules of Court.

SO ORDERED.

MA. ALICIA AUSTRIA-MARTINEZ
Associate Justice

WE CONCUR:

NATHANIEL P. DE PANO, JR. NICOLOS P. LAPEMA, JR.

APPENDIX J

Republic of the Philippines
Supreme Court
Manila
Third Division

Gentlemen:

Quoted hereunder, for your information, is a resolution of the Third Division of this Court dated JAN 26 1994, G.R. No. 111237 (Nadina G. Gustilo, etc., et al. vs. Court of Appeals, et al.). The motion for leave to file rejoinder to petitioners' reply to private respondent to comment on the petition for review on certiorari, dated December 15, 1993, filed by counsel for private respondent is *DENIED*.

Acting on the petition for review on certiorari, as well as the comment of counsel for private respondents thereon and the reply of counsel for petitioners to said comment, the Court finds that no reversible error was committed by the appellate court, and accordingly, Resolves to *DENY* the petition.

Very truly yours,

JULIETA V. CARREON
Clerk of Court

ALFREDO P. MARASEGAN, JR.
Asst. Div. Clerk of Court

APPENDIX K

(Article 263, Civil Code of the Philippines)

Art. 263. The action to impugn the legitimacy of the child shall be brought within one year form the recording of the birth in the Civil Register, if the husband should be in the same place, or in a proper case, any of his heirs.

If he or his heirs are absent, the period shall be eighteen months if they should reside in the Philippines; and two years if abroad. If the birth of the child has been concealed, the term shall be counted from the discovery of the fraud.

APPENDIX L

(Articles 170 and 171, Family Code of the Philippines)

Art. 170. The action to impugn the legitimacy of the child shall be brought within one year from the knowledge of the birth or its recording in the civil register, if the husband, or in a proper case, any of his heirs should reside in the city or municipality where the birth took place or was recorded.

If the husband or, in his default, all of his heirs do not reside at the place of birth as defined in the first paragraph or where it was recorded, the period shall be two years if they should reside in the Philippines; and three years if aborad. If the birth of the child has been concealed from or was unknown to the husband or his heirs, the period shall be counted from the discovery or knowledge of the birth of the child or of the fact of registration of said birth, whichever is earlier.

Art. 171. The heirs of the husband may impugn the filiation of the child within the period prescribed in the preceding article only in the following cases:

1) If the husband should die before the expiration of the period fixed for bringing his action;

2) If he should die after the filing of the complaint without having desisted therefrom; or

3) If the child was born after the death of the husband.

APPENDIX M

(Articles 255 and 256, Civil Code of the Philippines)

Art. 255. Children born after one hundred and eighty days following the celebration of the marriage, and before three hundred days following its dissolution or the separation of the spouses shall be presumed to be legitimate.

Against this presumption no evidence shall be admitted other than that of the physical impossibility of the husband's having access to his wife within the first one hundred and twenty days of the three hundred which preceded the birth of the child.

This physical impossibility may be caused:

(1) By the impotence of the husband;
(2) By the fact that the husband and wife were living separately, in such a way that access was not possible;
(3) By the serious illness of the husband.

Art. 256. The child shall be presumed legitimate, although the mother may have declared against its legitimacy or may have been sentenced as an adulteress.

APPENDIX N

[Excepts from: *Ty Kong v. Republic of the Philippines*, 94 Philippine Reports 321 (1954)]

In the matter of the petition of Atty. Ty Kong Tin to correct the mistake as appearing in the Civil Register of the City of Manila. Ty Kong Tin, petitioner and appellee, vs. Republic of the Philippines, oppositor and appellant.

. . .

[Text Omitted]

GAUTISTA ANGELO, J.:

This is a petition filed by Ty Kong Tin to correct certain mistakes which had allegedly been committed in the civil register of the Civil Registrar of the City of Manila concerning his citizenship.

On May 9, 1951, Petitioner filed in the Court of First Instance of Manila a petition alleging that he is a Filipino citizen duly licensed to practice law in the Philippines; that all his children were born in the City of Manila whose births were duly reported to the civil registrar by the midwife or doctor who had attended their births but in submitting the report it was made to appear therein that the citizenship of petitioner was "Chinese" instead of "Filipino"; that the aforesaid mistakes were committed by the midwife or doctor without any knowledge or consent o petitioner who became aware thereof only when he asked for a certified copy of the birth certificates of his children; and, therefore, he prays that an order be issued directing the civil registrar to correct the pertinent portion of the civil register by making it appear therein that petitioner as well as his children are Filipino citizens and not Chinese citizens, as authorized by article 412 of the new Civil Code.

The Civil Registrar of Manila, in his answer, states that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the petition but he has no objection to making the required correction provided he is so ordered by the court.

the court set the petition for hearing not after ordering petitioner to serve a copy thereof on the Solicitor General for whatever action he may deem proper to take in the premises. After the hearing was held, the Solicitor General submitted a written opposition wherein he asks that the petition be denied on the ground that petitioner has failed to present satisfactory and convincing evidence in support of his claim that he is a Filipino citizen.

Issues having been joined, the court rendered decision overruling the opposition of the Solicitor General and holding that the evidence presented by petitioner sufficiently establishes the claim that he and his children are Filipino citizens, and, consequently, it ordered the Civil Registrar of Manila to make the necessary correction in his register as prayed for in the petition. From his decision the Solicitor General has appealed.

when the case came up for discussion before the members of this Court, the issue that became the center of controversy revolved around the interpretation of the provisions of article 412 of the new Civil Code under which the petition under consideration was filed. This article provides that "No entry in a civil register shall be changed or corrected, without a judicial order." The bone of contention was the extent or scope of the matters that may be changed or corrected as contemplated in said legal provision. After a mature deliberation, the opinion was reached that what was contemplated therein are mere corrections of mistakes that are clerical in nature and not those which may affect the civil status or the nationality or citizenship of the persons involved. If the purpose of the petition is merely to correct a clerical

error then the court may issue an order in order that the error or mistake may be corrected. If it refers to a substantial change, which affects the status or citizenship of a party, the matter should be threshed out in a proper action depending upon the nature of the issue involved. Such action can be found at random in our substantive and remedial laws the implementation of which will naturally depend upon the factors and circumstances that might arise affecting the interested parties. This opinion is predicated upon the theory that the procedure contemplated in article 412 is summary in nature which cannot cover cases involving controversial issues.

It is our opinion that the petition under consideration does not merely call for a correction of a clerical error. It involves a matter which concerns the citizenship not only of petitioner but of his children. It is therefore an important controversial matter which can and should only be threshed out in an appropriate action.

. . .

[Text Omitted]

Wherefore, the decision appealed from is reversed. The petition is dismissed without pronouncement as to costs.

APPENDIX O

[Excepts from: *Republic v. Bartolome*,
Vol. 138 Supreme Court Reports Ann., 442 (1985)]

REPUBLIC OF THE PHILIPPINES, petitioner, vs.
THE HONORABLE FERNANDO BARTOLOME,
Presiding Judge, Court of First Instance
of Pampanga, DOMINADOR P. DIZON and the
CIVIL REGISTRAR of Arayat, Pampanga, respondents.

No. L-38109

Philippine Supreme Court, SECOND DIVISION

1985 Philippine S. Ct. LEXIS 3537

September 6, 1985

MAKASIAR, J.:

In this petition for review on certiorari, the State seeks to annul the order dated November 2, 1973, of respondent Honorable Fernando M. Bartolome, Presiding Judge of the then Court of First Instance of Pampanga, in Special Proceedings Case No. 2350, granting the petition of respondent Dominador P. Dizon for correction and/or cancellation of entries in the Civil Registry, and the order dated December 11, 1973, denying the Sate's motion for reconsideration.

The dispositive portion of the questioned order dated November 2, 1973 of the respondent Judge reads:

"WHEREFORE, in the light of the foregoing, the Court hereby grants the instant petition and orders the Local Civil Registrar of Arayat, Pampanga, to make the necessary correction of the entries in the record of birth of herein

petition from the name 'Domingo Patawaran' to 'Dominador P. Dizon' and opposite the words 'Name of Father' from 'Unknown' to "Policarpio Dizon'" (p. 24, rec.).

On September 7, 1973, respondent Dominador P. [*2] Dizon filed a petition for correction and/or cancellation of entries in the Civil Registry (pursuant to Rule 108, Rules of Court, in relation to Article 412, Civil Code) before the then Court of First Instance of Pampanga, docketed as Special Proceedings Case No. 2350.

In his petition, respondent Dominador P. Dizon alleged, among others, that he is a Filipino, of legal age, widower, with residence and postal address at 717 I. Tolentino, Grace Park, Caloocan City; that he was born on September 15, 1908 in Arayat, Pampanga, of the late spouses Policarpio Dizon of Bacolor, Pampanga and Anselma Patawaran, of Arayat, Pampanga; that on July 22, 1962, when he secured his certificate of birth from the local civil registrar of Arayat, Pampanga, he discovered that his name appears therein as "Domiingo Patawaran" and after the column "Name of Father" is typewritten the word "Unknown," which both entries are incorrect; that his real name is Dominador P. Dizon by which he is known since childhood up to the present; that on September 16, 1939 he was baptized at the Parish Church of Espiritu Santo in Manila, with the name Dominador P. Dizon and his father's name, Policarpio Dizon; and that in view [*3] of the said inaccurate entries in his record of birth, he will suffer inconvenience in securing passport and visas in going aboradl. He prayed that respondent Judge authorize the local civil registrar of Arayat, Pampanga, to change his name in his record of birth from "Domingo Patawaran" to "Dominador P. Dizon'" and to delete the word "Unknown" after the column "Name of Father," and in lieu thereof, place "Policarpio Dizon'" (p. 18, rec.).

Finding the petition to be sufficient in form and substance, the court a quo issued an order setting the same for hearing on

October 4, 1973 and caused the order to be published once a week for three (3) consecutive weeks in a newspaper of general circulation in the province of Pampanga (p. 25, rec.).

The hearing set on October 4 was postponed to October 27, 1973 and when the same was called on that day, nobody interposed an objection to the granting of the petition. Consequently, respondent Judge appointed Atty. Pedro Lagman as special counsel to represent the Office of the Local Civil Registrar of Arayat, Pampanga, whose only objection to the petition was that if the petition will be considered as one for a change of name, the petition should be [*4] denied on the ground that the publication of the notice of hearing was not properly made for such an action. However, if it is considered as a petition for correction of entries in the civil registry, then he withdraws his objection (p. 23, rec.).

On November 2, 1973, after due hearing, the lower court issued an order directing the local civil registrar of Arayat, Pampanga, to make the necessary correction of entries in the record of birth of respondent-petitioner Dominador P. Dizon (p. 20, rec.).

On November 9, 1973, the State, through the Provincial Fiscal of Pampanga, filed a motion for reconsideration on the grounds that the lower court did not acquire jurisdiction over the petition, and that the errors sought to be corrected are substantial and therefore not in the contemplation of Article 12 of the Civil Code, in relation to Rule 108 of the Rules of Court (p. 25, rec.).

On December 11, 1973, respondent Judge issued an order denying the motion for reconsideration filed by the provincial fiscal of Pampanga (p. 28, rec.).

Hence, this petition for review on certiorari by the State.

The petition should be granted.

In a long line of decisions, starting from the 1954 case of *Ty Kong vs. Republic* (94 Phil. 321) [*5} to the case of Rosales vs. Castillo Rosales (132 SCRA 132, September 28, 1984), this Court laid to rest the question as to whether or not substantial corrections and/or alterations can be made in the civil registry pursuant to Rule 108 of the Rules of Court in relation to Article 412 o the Civil Code.

It is a settled doctrine that under the summary procedure contemplated in Article 412 of the Civil Code, as implemented by Rule 10 of the Rules of Court, entries which can be corrected ". . . refer to those mistakes that are clerical in nature or changes that are harmless and innocuous, such as the correction of a misspelled name or occupation of the parents (*Ansaldo vs. Republic*, 102 Phil. 1046), or those that are visible to the eyes or obvious to the understanding, or 'errors made by a clerk or transcriber, a mistake in copying or writing'" (Wong vs. Republic, 115 SCRA 500, July 30, 1982).

In the instant case, there is no doubt tat the alteration sought by respondent Dominador P. Dizon is not legally possible under Rule 108 of the Rules of Court in relation to Article 412 of the Civil Code, sine it is substantial and controversial in nature.

But even [*6] granting that the petition is one for change of name under Rule 103 of the Rules of Court, still the alteration sought cannot be granted because publication as required by law was not properly made. Section 3 of Rule 103 provides that the court shall direct that its order fixing the date and place for the hearing of the petition be published before the hearing at least once a week for three (3) consecutive weeks in a newspaper of general circulation published in the province. Section 3 further provides that "the date set for hearing shall not be within thirty (30) days prior to an election nor within four (4) months after the last publication of the notice.

The Provincial Fiscal as well as all the heirs of the late Policarpio Dizon should be notified.

Moreover, in a petition for change of name, the Solicitor General must be notified by service of a copy of the petition which in the instant case was not done.

A change in the entry from "Domingo Patawaran" to "Dominador P. Dizon", and the alteration of the word "Unknown" after the column "Name of Father" to "Policarpio Dizon", do not only partake of the nature of a change of name, but also principally involve the issue of paternity [*7] and filiation.

Respondent Dominador P. Dizon, in his answer, admits that he was born on September 15, 1908 as an illegitimate son of the late Policarpio Dizon, married, of Bacolor, Pampanga, and the late Anselma Patawaran, single, of Arayat, Pampanga (p. 43, rec.). From this fact, it is obvious that his purpose in this proceeding he filed on September 7, 1973 - after about 65 years - is an audacious indirect attempt to establish his filiation with the late Policarpio Dizon through the simple expedient of changing the entries in his record of birth in the civil registry and his right to inherit. This is plainly not possible.

WHEREFORE, THE ORDER OF THE TRIAL COURT DATED NOVEMBER 2, 1973 IS HEREBY SET ASIDE AND THE PETITION DISMISSED, WITH COSTS AGAINST THE RESPONDENT DOMINADOR P. DIZON.

SO ORDERED.

Conception, Jr. (Actg. Chairman), Escolin, Cuevas and Alampay, JJ., concur.

Abad Santos, J., is on leave.

APPENDIX P

[Excepts from: *V.D.A. DeCastro v. Republic*,
Vol. 134 Supreme Court Reports Ann., 14 (1985)]

IN RE: PETITION FOR CORRECTION OF NAME
IN THE CIVIL REGISTRY OF MANILA;
SATURNINA VDA. DE CASTRO, petitioner-appellee,
vs. REPUBLIC OF THE PHILIPPINES, oppositor-appellant.

No. L-28520

Philippine Supreme Court, FIRST DIVISION

1985 Philippine S. Ct. LEXIS 3230

January 17, 1985

RELOVA, J.:

Direct appeal on points of law from a decision of the then Court of First Instance of Manila in Civil Case No. 70128, the dispositive portion of which is as follows;

"Considering all the foregoing, the Court finds the petition to be meritorious and grants the same. The Court declares that Ramon V. Castro, Jr., Ramon George Castro, Jr. and George F. Castro are one and the same person. The Civil Registrary of the City of Manila is ordered to make the correction in the records of the Civil Registry changing the name George F. Castro as appearing therein [*3] to that of Ramon V. Castro in the original of the certificate of birth, certified photostatic copy of which is now marked as Exhibit B." (p. 21, Record on Appeal)

The foregoing judgment was entered upon petition of Saturnina V. Vda. de Castro, file din the court aforesaid, praying that an order be issued "declaring that Ramon V.

Castro, George F. Castro and Ramon George Castro, Jr., to be the names of one and the same person, namely that of Ramon V. Castro and directing the Civil Registrar of the City of Manila to make the necessary correction in the records of the Civil Registry changing the name of George F. Castro to Ramon V. Castro." (p. 3, Record on Appeal)

Petitioner Saturnina V. Vda. de Castro in her petition alleged that her son Ramon V. Castro was born on August 31, 1946 at St. Luke's Hospital; that said Ramon V. Castro is also known as Ramon George Castro, Jr. in the baptismal certificate and George F. Castro in the birth certificate; that Ramon V. Castro is her child's rue and lawful name since childhood affixing said name in all transactions both in private and official documents; and that confusion arose when in choosing the name to be given to Ramon V. Castro upon his [*4] birth three names were proposed, namely: Ramon V. Castro, Ramon George Castro, Jr. and George F. Castro, the third name being erroneously recorded in the Civil Registry of Manila.

The court caused copies of the petition to be served on the Solicitor General and the Civil Registrar of Manila. The Republic of the Philippines, through the Solicitor General, opposed the petition claiming that "correction of entries in the civil registry contemplated under Article 412 of the Civil Code refers to clerical mistakes (Ty Kong Tin vs. Republic, L-5609, February 5, 1954). A clerical mistake is one which is visible to the eyes or obvious to the understanding; and error made by a clerk or a clerk or a transcriber; a mistake in copying or writing (Black vs. Republic, L-10869, November 28, 1958); Beduya vs. Republic, No. L-17639, May 29, 1964). Errors in birth certificates which are not clerical in nature cannot be corrected by means of a petition for correction (Lui Lin vs. Republic, No. L18213, December 24, 1963)." (p. 10, Record on Appeal)

The court a quo declared that upon proof of mistake it did have the power to order the change sought, and did so. Wherefore, the state appealed.

The decision [*5] must be reversed. It has been the consistent ruling of this Court since the *Ty Kong Tin vs. Republic*, 94 Phil. 321, "that substantial alterations, such as those affecting the status and citizenship of a person in the Civil Registry Records, can not be ordered by the court unless first threshed out in an 'appropriate action wherein all parties who may be affected by the entries are notified or represented' (see Rule 108 of the Revised Rules of Court), and that the summary proceedings under Article 412 of the Civil Code only justify an order to correct innocuous or clerical errors, such as misspellings and the like, errors that are visible to the eyes or obvious to the understanding (Baybayan vs. Republic of the Philippines, 16 SCRA 403)."

In Lui Lin vs. Nuno, 9 SCRA 707, this Court said:

"Article 412 of the New Civil Code contemplates mere corrections of mistakes that are clerical in nature, like misspelled names or occupations of the parents, etc., but not those which may effect the civil status, or the nationality or citizenship of the persons involved, for in such cases it is necessary to file the proper action wherein not only the State but also all the [*6] parties concerned should be made parties defendants.

"In the case at bar, where it is admitted that the name placed in the certificates of birth is not the name of a different person but the alias name of the petitioner himself and the name of the child was her real name, so that it cannot be contended that a mistake has been committed in giving the information to the local civil registry, while the changes sought for may affect the status of the petitioner or the paternity and filiation of his children, it is held that the lower

court erred in granting the petition under Article 412 of the New Civil Code."

Indeed, the mistake in the case at bar is not the mistake or error contemplated under Article 412 of the New Civil Code which justifies the correction of the birth certificate. Article 412 allows correction only of clerical mistakes, not those substantial changes which may affect the identity (a man is identified by his name), personality, civil status or nationality of the persons involved. Thus, errors in birth certificate which are not clerical in nature, as in this case before Us, cannot be corrected by means of a petition for correction.

ACCORDINGLY, the decision appeal [*7] from is REVERSED. Costs against petitioner-appellee.

SO ORDERED.

APPENDIX Q

(Article 15, Civil Code of the Philippines)

Art. 15. Laws relating to family rights and duties or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad.

APPENDIX R

(Article 71, Civil Code of the Philippines)

Art. 71. All marriages performed outside the Philippines in accordance with the laws in force in the country where they were performed, and valid there as such, shall also be valid in this country, except bigamous, polygamous, or incestuous marriages as determined by Philippine law.

APPENDIX S

[Excepts from: *Yap v. Court of Appeals*,
Philippine S. Ct., October 28, 1986]

SHIRLEY YAP, in her own behalf and in her capacity as Administratrix of the estate of MANING YAP, JAIME YAP, and TALINA BIANONG VDA. DE YAP, petitioners, vs. COURT OF APPEALS, NANCY J. YAP, MANING YAP, JR., JULIA YAP, JASMIN YAP, and SAMUEL YAP, respondents.

GUITIERREZ, JR., J.:

This is a petition to review the Court of Appeals which set aside the earlier decision of the then Court of First Instance of Lanao del Sur in Special Proceeding No. 1334 (R-61), declaring the petitioners as the legal heirs of the late Maning Yap entitled to inherit his estate and dismissing the opposition filed by the private respondents. The dispositive portion of the decision on appeal reads:

"WHEREFORE, the decision appealed from is hereby set aside and, after a complete and correct inventory is returned by the administratrix, the entire estate of the deceased Maning Yap shall be divided into two equal parts, one-half (1/2) corresponding to the petitioner Talina Bianong and her children Shirley Yap and Jaime Yap and the other half corresponding to the oppositors Nancy J. Yap and her children Maning Yap, Jr., Julia Yap, Jasmin Yap and Samuel Yap, without pronouncement as to costs."

Maning Yap, during his lifetime married twice; first, to Talina Bianong in 1939 and second, to Nancy [*2] Yap on December 11, 1948.

Maning Yap and Talina Bianong were married at Bara-as Plantation, Malabang, Lanao del Sur, in accordance with the

Muslim rites and practices prescribed b the Islam religion professed by both of them. Immediately, after the marriage, the couple lived in the house of the parents of Maning Yap at the poblacion of Malabang, Lanao del Sur. Out of the marriage, four children were born; two of them died in infancy during the Japanese occupation, while the two others are petitioners Shirley Yap and Jaime Yap.

While the first marriage was still subsisting, Maning Yap married Nancy J. Yap on December 11, 1948 in a civil ceremony performed by District Judge Juan Sarenas of the Court of First Instance of Cotabato. Nancy Yap entered into the marriage in the belief that Maning Yap was not a married man. They had four children namely respondents Maning Yap, Jr., Julia Yap, Jasmin Yap and Samuel Yap. On February 21, 1964, Maning Yap died in Piagapo, Lanao del Sur, in the crash of an airplane of the Philippine Air Lines. At the time of his death, he, therefore, had two families living separately about 80 kilometers apart.

On March 3, 1964, Talina Bianong Vda. de Yap filed [*3] Special Proceeding No. 1334 (Intestate Estate of Maning Yap) before the Court of First Instance of Lanao del Sur, seeking the issuance of letters of administration for the estate of Maning Yap. Among other things, the petition alleged that maning Yap left personal and real properties all located at Malabang, Lanao del Sur, with an approximate value of P100,000.00.

The petition was opposed by Nancy J. Yap and her minor children on the ground that she is the legitimate widow of Maning Yap and that Maning Yap, Jr., Julia Yap, Jasmin Yap and Samuel Yap, all minors, are their legitimate children.

Talina Bianong was initially appointed special administratrix of the intestate estate of Maning Yap. However, after a formal hearing and on recommendation of Talina, the

lower court appointed Shirley Yap as regular administratrix of the intestate estate of Maning Yap.

Various claims filed by the creditors against the intestate estate of Maning Yap were duly approved by the court and paid by the administratrix. Since there still existed a residue of the intestate estate consisting of real and personal properties and collectible debts after payments to creditors, the court set the case for hearing [*4] to arrive at a declaration of heirship for the purpose of liquidating the conjugal partnership of the late Maning Yap and his surviving spouse and to determine the heirs entitled to inherit his intestate estate.

After trial, the lower court rendered decision declaring Talina Bianong and her children as the legal heirs of Maning Yap. The dispositive portion of the decision reads:

"IN VIEW OF ALL THE FOREGOING, judgment is hereby rendered:

"(a) Declaring Talina Bianong, Shirley Yap and Jaime Yap, the legal heirs of the late Maning Yap and entitled to inherit or succeed to his intestate estate with Talina Bianong, as his surviving spouse, and Shirley Yap and Jaime Yap, as his surviving legitimate children;

"(b) Adjudicating to Talina Bianong one-third (1/3) of the whole intestate estate of the late Maning Yap, as her share, pursuant to Art. 996 of the Ne Civil Code; to Shirley Yap, the other one-third (1/3) as her share and to Jaime Yap the remaining one-third (1/3), also as his share, pursuant to Art. 980 in conjunction with Art. 996 of the new Civil Code.

"The opposition and claim of the opposition is hereby dismissed without costs."

Upon appeal by Nancy Yap and her children, [*5] the appellate court reversed and set aside the decision. As stated

earlier, the court of Appeals ruled that the estate of Maning Yap should be equally divided into two equal parts: one-half (1/2) to Talina Bianong and her children and the other half (1/2) to Nancy Yap and her children.

The appellate court applied the ruling in *Lao and Lao v. Dee Tim*, (45 Phil. 739). The facts in the cited case are similar to the case at bar in that Yap Siong in his lifetime contracted two marriages; first to Dee Tim on September 14, 1893 in China with whom he had three children and second to Maria Lao on June 24, 1903 with whom he had one child. Moreover, Maria Lao entered into the marriage believing that Yap Siong wa snot then a married man. Yap Siong died on September 1922 leaving properties which were claimed by the two families. In resolving the issue on how the properties of Yap Siong should be divided, this Court applied the Leyes de Partidas (Law 1; Title 13, Partida 4), to wit:

xxx xxx xxx [sic]

". . . [W]here two women innocently and in good faith are legally united in holy matrimony to the same man, their children and each family will be entitled to one-half of the [*6] estate of the husband upon distribution of his estate. That provision of the Leyes de Partidas is a very humane and wife law. It justly protects those who innocently have entered into the solemn relation of marriage and their descendants. The good faith of all the parties will be presumed until the contrary is positively proved. (Article 69, Civil Code; Las Leyes de Matrimonio, section 96; *Gaines v. Hennen*, 65 U.S., 553.)

"A woman who is deceived by a man who represents himself as single and who married him, she and her children born while the deception lasted, under the Spanish law, are entitled to all the rights of a legitimate wife and children. The common law allowing none of the incidents of a true marriage to follow another marriage entered into during the continuance of a first, was early found to work a great injustice upon the

innocent parties to the second marriage, and specially upon the offspring of such second marriage. . . ."

The petitioners now contend that Maning Yap died in 1964 when the New Civil Code had already superseded the old Spanish Civil Code. They state that pursuant to Article 2263 of the New Civil Code, the distribution of the [*7] estate of Maning Yap should be in accordance with the new codal provisions and not the Leyes Partidas, which is an old law no longer applicable.

We agree.

Article 2263, a transitional provision in the New Civil Code which took effect on August 30, 1950 states:

"Rights to the inheritance of a person who died, with or without a will, before the effectivity of this Code, shall be governed by the Civil Code of 1889, by other previous laws, and by the Rules of Court. The inheritance of those who, with or without a will, die after the beginning of the effectivity of this Code, shall be adjudicated and distributed in accordance with this new body of laws and by the Rules of Court; but the testamentary provisions shall be carried out insofar as they may be permitted by this Code. Therefore, legittimes, betterments, legacies and bequests shall be respected; however, their amount shall be reduced if in no other manner can every compulsory heir be given his full share according to this Code. (Rule 12a)"

The Report of the Code Commission explains the rule, to wit:

"The decisive fact which gives origin to the right of the heirs, devisees and legatees is the death of the decedent. This is the [*8][basis of the foregoing rule. NO heir, devisee or legatee has any vested right until the moment of such death (Civil Code, Padilla, Volume VII, 1975, p.712)."

We have accordingly ruled that the rights to the inheritance of a person who died before the effectivity of the Ne Civil Code shall be governed by the Civil Code of 1889, by other previous laws and by the Rules of Court (see *Vidaurrazaga v. Court of Appeals*, 91 Phil. 492; *Canales v. Arrogante*, 91 Phil. 9; and *Morales, et al. v. Yanez*, 98 Phil. 677), while the rights to the inheritance of a person who died after the effectivity of the New Civil Code shall be governed by the New Civil Code (Del Prado v. Santos, 18 SCRA 68).

There is no dispute that the marriage of Talina Bianong to Maning Yap was valid and that the second marriage contracted by the latter with Nancy Yap was illegal and void pursuant to Act 3613 of the Philippine Legislature, the marriage Law which was in force when the two marriages were celebrated to wit:

"SEC. 29. Illegal Marriages. Any marriage subsequently contracted by any person during the lifetime of the first spouse [*9] of such person with any person other than such first spouse shall be illegal and void from its performance, unless;

"(a) The first marriage was annulled or dissolved;

"(b) The first spouse had been absent for seven consecutive years at the time of the second marriage without the spouse present having news of the absentee being alive, or the absentee being generally considered as dead and believed to be so by the spouse present at the time of contracting such subsequent marriage, the marriage so contracted being valid in either case until declared null and void by a competent court."

Bearing this in mind, how must the estate of Maning Yap be distributed?

The records show that the real and personal properties under administration in the intestate estate proceedings of Maning Yap were acquired by Talina Bianong and the

deceased Maning Yap during their marriage. Hence, these properties, in the absence of any evidence to the contrary are considered conjugal properties of Talina Bianong and Maning Yap (Article 142, New Civil Code). Considering that there was no liquidation of the conjugal partnership of gains during the lifetime of Maning Yap, such liquidation must be carried [*10] out in the intestate proceedings of Maning Yap, the deceased spouse as expressly provided in Section 2, Rule 73, Revised Rules of Court (Lapuz v. Eufemio, 43 BCRA 177).

Article 142 of the Ne Civil Code provides:

"By means of the conjugal partnership of gains the husband and wife place in a common fund the fruits of their separate property and the income from their work or industry, and divide equally, upon the dissolution of the marriage or of the partnership, the net gains or benefits obtained indiscriminately by either spouse during the marriage."

and Article 185 thereof states:

"The net remainder of the conjugal partnership of gains shall be divided equally between the husband and the wife or their respective heirs, unless a different basis of division was agreed upon in the marriage settlements."

Pursuant to these provisions, the net remainder of the conjugal partnership of gains after money claims filed by creditors against the intestate estate of Maning Yap approved by the lower court have been paid by the administratrix should be equally divided between Maning Yap and Talina Bianong as their shares. The one-half shares of Maning ap would then comprise his intestate estate [*11] to be distributed among his heirs. (See also Vda. de Delizo v. Delizo, 69 SCRA 216).

Under the law of succession in the New Civil Code, Maning Yap's legal heirs are Talina Bianon, her children Shirley Yap and Jaime Yap and the children of Nancy Yap by

Maning Yap namely: Maning Yap, Jr., Julia Yap, Jasmin Yap and Samuel Yap. Talina Bianong, the first wife had not lost or relinquished her status as putative heir of her husband. She is entitled to share in Maning Yap's estate upon his death (Gomez v. Lipana, 33 SCRA 615). On the other hand, Nancy Yap, the second wife cannot inherit from Maning Yap because their marriage was void ab initio. (Art. 83, New Civil Code, People v. Mendoza, 95 Phil. 845). However, Nancy Yap's children by Maning Yap have the status of natural children by legal fiction and are considered compulsory heirs of the late Maning Yap. (Articles 89 and 887, New Civil Code).

Considering the foregoing, the estate of Maning Yap which is one-half (1/2) pro indiviso of the net remainder of the conjugal partnership of gains of the first marriage (Articles 142 and 185 New Civil Code), the other half being the share of Talina Bianong, should be distributed [*12] as follows,

a. To the legitimate children, Shirley Yap and Jaime Yap - one-half (1/2) of the resulting net estate to be divided equally among them pursuant to Article 888 of the New Civil Code;

b. To the legitimate widow Talina Bianong - one-fourth (1/4) of the net estate taken from the free portion or disposable half of the estate pursuant to Article 999 in relation to Article 897 of the New Civil Code; and

c. To the natural children by legal fiction - Maning Yap, Jr., Julia Yap, Jasmin Yap and Samuel Yap - the remaining one-fourth (1/4) of the net estate to be shared equally between them pursuant to the first and third paragraphs of Article 895 in relation to Article 983 of the New Civil Code.

WHEREFORE, the instant PETITION is GRANTED. The questioned decision of the Court of Appeals is hereby REVERSED and SET ASIDE. The widow, Talina Bianong shall receive one half (1/2) of the whole intestate estate as her share in the net remainder of the conjugal partnership of

game. The other half, which is the net estate of the late Maning Yap, is distributed and adjudicated as stated above.

SO ORDERED.

Feria (Chairman), Fernan Alampay and Paras, JJ., concur.

(3)

Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,
PETITIONERS

v.

NADINA (MARAVILLA) GUSTILO, Individually
and as Former Administratrix of
The Estate of Armando C. Gustilo, Deceased,
and as Guardian of June Salvacion (Maravilla)
Gustilo; JOSEPH S. HORRIGAN, as Guardian Ad Litem
and Attorney Ad Litem of June Salvacion Gustilo;
and the KANALY TRUST COMPANY, as Administrator
of the Estate of Armando C. Gustilo, Deceased,
RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS (HOUSTON) TEXAS

VOLUME 2 OF 2 (APPENDICES T - MM)

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75 pp

INDEX TO APPENDIX

APPENDIX A - Order from Fourteenth Court of Appeals Granting Motion for Stay A-1

APPENDIX B - Notice from Texas Supreme Court that Motion for Rehearing of Writ of Error Overruled . . A-2

APPENDIX C - Notice from Texas Supreme Court that Application for Writ of Error Denied A-4

APPENDIX D - Opinion of the Fourteenth Court of Appeals A-5

APPENDIX E - Notice from Fourteenth Court of Appeals that Motion for Rehearing and Motion for Rehearing En Banc Denied A-31

APPENDIX F - *Arsenal v. Intermediate Appellate Court*, 1986 Philippine Supreme Court, Lexus 2709 (July 14, 1986) A-33

APPENDIX G [Duplicate copy of Appendix B] - Notice from Texas Supreme Court that Motion for Rehearing of Writ of Error Overruled A-41

APPENDIX H - The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966); U.N.G.A. Res. 2200 (1976); Senate Ratification June 8, 1992. *Resolution of Advice and Consent to Ratification of The International Covenant on Civil and Political Rights:* 138 Cong. Rec. S4781 (1991) A-43

APPENDIX I - Excerpts from opinion of Philippine Court of Appeals, *Gustilo v. Agdamag*, G.R. Sp. No. 28626) A-44

APPENDIX J - *Gustilo v. Court of Appeals*, G.R. No. 111237, Philippine S. Ct., March 23, 1994 . . . . . A-51

APPENDIX K - Article 263, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-52

APPENDIX L - Articles 170 and 171, Family Code of the Philippines Explained, Lizaso, Vol. 2, 1990 Edition" A-53

APPENDIX M - Articles 255 and 256, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-54

APPENDIX N - *Ty Kong v. Republic of the Philippines*, 94 Philippine Reports 321, 1954 . . . . . A-55

APPENDIX O - *Republic v. Bartolome*, Vol. 138 Supreme Court Reports Annotated, 442 (1985) A-58

APPENDIX P - *V.D.A. DeCastro v. Republic*, Vol. 134 Supreme Court Reports Ann., 14 (1985) A-63

APPENDIX Q - Article 15, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-67

APPENDIX R - Article 71, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-68

APPENDIX S - *Yap v. Court of Appeals* (Philippine S. Ct., October 28, 1986) A-69

APPENDIX T - Excerpts from United States Constitution A-78

APPENDIX U - *Macadangdang v. Court of Appeals*, 199 Sup. Ct. Reports Ann. 73 (September 12, 1980) A-80

APPENDIX V - UNIVERSAL DECLARATION OF HUMAN RIGHTS; U.N.G.A. Res. 217, U.N. Doc. A/810 (III 1948) . A-89

APPENDIX W - Article 2035, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-90

APPENDIX X - Statement of Facts excerpt, pages 560-563 A-91

APPENDIX Y - Article 1409, Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978 . . . . . A-93

APPENDIX Z - Legal opinion of Arturo M. Tolentino A-94

APPENDIX AA - Partial listing of foreign statutes and cases discussed in Appellants' principal brief A-100

[APPENDIX BB intentionally omitted]

APPENDIX CC - Point of error and sub-points under Appellants' sixth point of error A-116

APPENDIX DD - 61 Stat 1174: Treaties and Other International Acts Series 1568. *Treaty of General Relations Between the United States of America and the Republic of the Philippines* A-118

APPENDIX EE - Listing of numerous motions urging probate court to notice and apply foreign law A-119

APPENDIX FF - Index to appendix of foreign authority filed in Court of Appeals August 2, 1996 . . . . . A-123

APPENDIX GG - Exception to defendant's offer of ALJG38 and ALGJ39 . . . . . A-137

APPENDIX HH - Order of court dated June 2, 1995 granting summary judgment A-139

APPENDIX II - Federal Statutes A-141

APPENDIX JJ - Federal Rules A-144

APPENDIX KK - Texas Statutes and Rules of Court . . A-145

APPENDIX LL - Tex.R.App.P. 90(a) A-147
APPENDIX MM - New Jersey Statute A-148

APPENDIX T

[U.S. Constitution]

Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States; between a State and Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a rand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

[Text Omitted]

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX U

[Excepts from: *Macadangdang v. Court of Appeals*, 199 Sup. Ct. Reports Ann. 73 (September 12, 1980)]

No. L-49542. September 12, 1980.*

ANTONIO MACADANGDANG, petitioner, *vs.* THE HONORABLE COURT OF APPEALS and ELIZABETH MEJIAS, respondents.

. . .

[Text Omitted]

The records show that respondent Elizabeth Mejias is a married woman, her husband being Crispin Anahwo (pp. 61-62, t.s.n., Sept. 21, 1972; pp. 10-11, Brief for Respondent [p. 198, rec.]). She allegedly had intercourse with petitioner Antonio Macadangdang sometime in March, 1967 (p. 38, t.s.n., June 7, 1972 in CC No. 109). She also alleges that due to the affair, she and her husband separated in 1967 (p. 63, t.s.n. Sept. 21, 1972). On October 30, 1967 (7 months or 210 days following the illicit encounter), she gave birth to a baby boy who was named Rolando Macadangdang in baptismal rites held on December 24, 1967 (Annex "A", List of Exhibits).

. . .

[Text Omitted]

The following provisions of the Civil Code and the Rules of Court should be borne in mind:

"Art. 255. Children born after one hundred and eighty days following the celebration of the marriage, and before three hundred days following its dissolution or the separation of the spouses shall be presumed to be legitimate.

"Against this presumption, no evidence shall be admitted other than that of the physical impossibility of the husband's having access to his wife within the first one hundred and twenty days of the three hundred which preceded the birth of the child.

"This physical impossibility may be caused:

"(1) By the impotence of the husband;
"(2) By the fact that the husband and wife were living separately, in such a way that access was not possible;
"(3) By the serious illness of the husband.

"Art. 256. The child shall be presumed legitimate, although the mother may have declared against its legitimacy or may have been sentenced as an adulteress.

"Article 257. Should the wife commit adultery at or about the time of the conception of the child, but there was no physical impossibility of access between her and her husband as set forth in article 255, the child is *prima facie* presumed to be illegitimate if it appears highly improbable, for ethnic reasons, that the child is that of the husband. For the purpose of this article, the wife's adultery need not be proved in a criminal case.

xx xx xx [sic]

"Sec. 4. Quasi-conclusive presumptions of legitimacy

"(a) Children born after one hundred eight days following the celebration of the marriage, and before three hundred days following its dissolution or the separation of the spouses shall be presumed legitimate.

"Against this presumption no evidence shall be admitted other than that of the physical impossibility of the husband's having access to his wife within the first one hundred and

twenty days of the three hundred which preceded the birth of the child.

"This physical impossibility may be caused:

"(1) By the impotence of the husband;
"(2) By the fact that the husband and wife were living separately, in such a way that access was not possible;
"(3) By the serious illness of the husband.

"(b) The child shall be presumed legitimate although the mother may have declared against its legitimacy or may have ben sentenced as an adulteress.

"(c) Should the wife commit adultery at or about the time of the conception of the child, but there was no physical impossibility of access between her and her husband as set forth above, the child is presumed legitimate, unless it appears highly improbable, for ethnic reasons, that the child is that of the husband. For the purpose of the rule, the wife's adultery need not be provided in a criminal case.
xx x" (Rule 131, Rules of Court).

Whether or not respondent and her husband were separated would be immaterial to the resolution of the status of the child Rolando. What should really matter is the fact that during the initial one hundred twenty days of the three hundred which preceded the birth of the aforenamed child, no concrete or even substantial proof was presented to establish physical impossibility of access between respondent and her spouse.

. . .
[Text Omitted]

In Our jurisprudence, this Court has been more definite in its pronouncements on the value of baptismal certificates. It thus ruled that while baptismal and marriage certificates may

be considered public documents, they are evidence only to prove the administration of the sacraments on the dates therein specified -- but not the veracity of the states or declarations made therein with respect to his kinsfolk and/or citizenship (Paa vs. Chan, L-25945, 23 SCRA 1331 [1968]), this Court held that a baptismal administered, in conformity with the rites of the Catholic Church by the priest who baptized the child, but it does not prove the veracity of the declarations and statements contained in the certificate that concern the relationship of the person baptized. Such declarations and statements, in order that the truth may be admitted, must indispensably be shown by proof recognized by law.

The child Rolando is presumed to be the legitimate son of respondent and her spouse. This presumption becomes conclusive in the absence of proof that there was physical impossibility of access between the spouses in the first 120 days of the 300 which preceded the birth of the child. this presumption is actually quasi-conclusive and may be rebutted or refuted by only one evidence -- the physical impossibility of access between husband and wife within the first 120 days of the 300 which preceded the birth of the child. This physical impossibility of access may be caused by any of these:

1. Impotence of he husband;

2. Living separately in such a way that access was impossible; and

3. Serious illness of the husband.

. . .

[Text Omitted]

. . . The law expressly refers to physical impossibility. Hence, a circumstance which makes sexual relations improvable, cannot defeat the presumption of legitimacy; but it may be proved as a circumstance to corroborate proof of

physical impossibility of access (Tolentino, citing Bonet 352; 4 Valverde 408).

. . .

[Text Omitted]

The separation between the spouses must be such as to make sexual access impossible. This may take place when they reside in different countries or provinces, and they have never been together during the period of conception (Estate of Benito Marcelo, 60 Phil. 442). Or, the husband may be in prison during the period of conception, unless it appears that sexual union took place through corrupt violation of or allowed by prison regulations (1 Manresa 492-500).

The illness of the husband must be of such a nature as to exclude the possibility of his having sexual intercourse with his wife; such as, when because of a sacroiliac injury, he was placed in a plaster cast, and it was inconceivable to have sexual intercourse without the most severe paid (Tolentino, citing Commissioner vs. Kotel, 256 App. Div. 352, 9 N.Y. Supp. p. 515); or the illness produced temporary or permanent impotence, making copulation impossible (Tolentino, citing Q. Bonet 352).

. . .

[Text Omitted]

So firm was this presumption originally that it cannot be rebutted unless the husband was incapable of procreation or was absent beyond the four seas, that is, absent from the realm, during the whole period of the wife's pregnancy (10 C.J.S. p.20).

The presumption of legitimacy of children born during wedlock obtains, notwithstanding the husband and wife voluntarily separate and live apart, unless the contrary is shown (Ala. Franks vs. State, 161 So. 549, 26 Ala. App. 430)

and this includes children *born after the separation* [10 C.J.S. pp. 23 & 24; italics supplied].

It must be stressed that Article 256 of the Civil Code which provides that the child is presumed legitimate although the mother may have declared against its legitimacy or may have been sentenced as an adulteress has been adopted for two solid reasons. First, in a fit of anger, or to arouse jealousy in the husband, the wife may have made this declaration (Powell vs. State, 95 N.E., 660). Second, the article is established as a guaranty in favor of the children whose condition should not be under the mercy of the passions of their parents. The husband whose honor if offended, that is, being aware of his wife's adultery, may obtain from the guilty spouse by means of coercion, a confession against the legitimacy of the child which may really be only a confession of her guilt. Or the wife, out of vengeance and spite, may declare the child as not her husband's although the statement be false. But there is another reason which is more powerful, demanding the exclusion of proof of confession or adultery, and it is, that at the moment of conception, it cannot be determined a woman cohabits during the same period with two men, by whom the child was begotten, it being possible that it be the husband himself (Manresa, Vol. I, pp. 503-504).

Hence, in general, good morals and public policy require that a mother should not be permitted to assert the illegitimacy of a child born in wedlock in order to obtain some benefit for herself (N.Y.--Flint vs. Pierce, 136 N.Y. S. 1056, cited in 10 C.J.S. 77).

The law is not willing that the child be declared illegitimate to suit the whims and purposes of either parent, nor merely upon evidence that no actual act of sexual intercourse occurred between husband and wife at or about the time the wife became pregnant. thus, where the husband denies having any intercourse with his wife, the child was still

presumed legitimate (Lynn vs. State, 47 Ohio App. 158, 191 N.E. 100).

With respect to Article 257 aforequoted, it must be emphasized that adultery on the part of the wife, in itself, cannot destroy the presumption of legitimacy of her child, because it is still possible that the child is that of the husband (Tolentino, citing Vera 170; 4 Borja 23-24).

It has, therefore, been held that the admission of the wife's testimony on the point would be unseemly and scandalous, not only because it reveals immoral conduct on her part, but also because of the effect it may have on the child, who is in no fault, but who nevertheless must be the chief sufferer thereby (7 Am. Jur. Sec. 21, pp.641-642).

In the case of a child born or conceived in wedlock evidence of the infidelity or adultery of the wife and mother is not admissible to show illegitimacy, if there is no proof of the husband's impotency or non-access to his wife (Iowa - Craven vs. Selway, 246 N.W. 821, cited in 10 C.J.S. 36).

At this juncture, it must be pointed out that only the husband can contest the legitimacy of a child born to his wife. He is the one directly confronted with the scandal and ridicule which the infidelity of his wife produces; and he should decide whether to conceal that infidelity or expose it, in view of the moral or economic interest involved (Tolentino, citing Bevilaqua, Familia, p.314).

The right to repudiate or contest the legitimacy of a child born in wedlock belongs *only* to the alleged father, who is the husband of the mother and can be exercised only by him or his heirs, within a fixed time, and in certain cases, and *only in a direct suit brought for the purpose* (La --Ducasse vs. Ducasse, 45 So.565, 120 La. 731; Saloy's Succ. 10 So.872, 44 La. Ann., cited in 10 C.J.S. 77; italics supplied).

Thus the mother has no right to disavow a child because maternity is never uncertain; she can only contest the identity of the child (La -- Eloi vs. Mader, 1 Rod. 581, 38 Am.D. 192).

. . .

[Text Omitted]

Respondent had shown total lack of or genuine concern for her child (Rolando) for, even after his birth, she left him in the care of a *yaya* for several months. This is not the normal instinct and behavior of a mother who has the safety and welfare of her child foremost in her mind. The filing of this case itself shows how she is capable of sacrificing the psycho-social future (reputation) of the child in exchange for some monetary consideration. This is blatant shamelessness.

It also appears that her claim against petitioner is a disguised attempt to evade the responsibility and consequence of her reckless behavior at the expense of her husband, her illicit lover and above all -- her own son. For this Court to allow, much less consent to, the bastardization of respondent's son would give rise to serious and far-reaching consequences on society. **This Court will not tolerate scheming married women who would indulge in illicit affairs with married men and then exploit the children born during such immoral relations by using them to collect from such moneyed paramours. This would be the vilest form of wrecking the stability of two families. This would be a severe assault on morality.** [Our emphasis.]

And as between the paternity by the husband and the paternity by the paramour, all the circumstances being equal, the law is inclined to follow the former; hence, the child is thus given the benefit of legitimacy.

Finally, Article 220 of the Civil Code reinforces the aforesaid principle when it provides thus:

"Art. 220. In case of doubt, all presumptions favor the solidarity of the family. Thus, every intendment of law or facts leans toward the validity of marriage, the indissolubility of the marriage bonds, the *legitimacy of children*, the community of property during marriage, the authority of parents over their children, and the validity of defense for any member of the family in case of unlawful aggression."

WHEREFORE, THE DECISION OF THE COURT OF APPEALS DATED JUNE 2, 1978, AND ITS RESOLUTION DATED NOVEMBER 6, 1878 ARE HEREBY REVERSED AND SET ASIDE. COSTS AGAINST PRIVATE RESPONDENT.

SO ORDERED.

APPENDIX V

[Excerpts from UNIVERSAL DECLARATION OF HUMAN RIGHTS; U.N.G.A. Res. 217, U.N. Doc. A/810 (III 1948)]

"Article 7. All are equal before the law and are entitled--to equal protection of the law . . ."

"Article 8. Everyone has the right to an effective remedy in the competent **national tribunals** for acts violating the fundamental rights granted him by the constitution or by law." [Emphasis added.]

"Article 10. Everyone is entitled in equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations. . .."

APPENDIX W

[Article 2035, Civil Code of the Philippines]

Art. 2035. No compromise upon the following question shall be valid:

(1) The civil status of persons;

(2) The validity of a marriage or a legal separation;

(3) Any ground for legal separation;

(4) Future support;

(5) The jurisdiction of courts;

(6) Future legitime.

APPENDIX X

[Excerpt from Statement of Facts, pp.560-563]

Ms. Charles: Thank you, Your Honor.

Defendant's 38, the compromise and settlement agreement between Nadina Gustilo and June Salvacion Gustilo and Jose Vicente Gustilo III and the compromise and settlement agreement and addendum thereto between Nadina Gustilo and June Salvacion Gustilo and Milagros Barco as guardian and next friend of Mary Joy Ann Gustilo, we object to the admission of those documents on the basis that the court of appeals' opinion recently issued in the Philippines is the law of the case.

The Court: I will overrule that. I find that the Philippine judgment is not final and that this Court does not have to give it full faith and credit.

Ms. Charles: We also object to the same documents on the basis of estoppel by judgment.

Mr. Horrigan: I would like to interpose an objection to the manner in which Ms. Charles is doing this. She came up here and said she wanted to make a bill of exception. The bill of exception is to be utilized when evidence proffered by a party is excluded by the Court. Then a bill of exception is used to put on that evidence.

What we have here is evidence admitted by this Court, and she raised her objection at the time. The Court admitted the

document and overruled it. She apparently now wants a second go-round, throwing up further objections. This is not the proper time or place or anything else for a bill of exception, so I would object to it on that basis.

The Court: I will overrule your objection. Go ahead, Counsel.

Ms. Charles: Your Honor, we further object to the admission of the compromise and settlement agreement and their addendum on the basis of res judicata.

The Court: Overruled for the same reason, Counsel.

Ms. Charles: We further object to the admission of the compromise and settlement agreement and their addendum on the basis that the contracts are ruled by Philippine law and thus Philippine law is the law of the case. The judgment in the Philippines is currently the law of that case.

The Court: All right. I will overrule that, that the Philippine judgment isn't final and the Court is not required to give it full faith and credit.

Ms. Charles: We further object to the admission of the compromise and settlement agreement and any addendum thereto comprised as part of Defendant's Exhibit 38 because comity should be afforded to the Philippine decision.

The Court: I will deny comity to the Philippine decision.

APPENDIX Y

[Article 1409, Civil Code of the Philippines]

Art. 1409. The following contracts are inexistent and void from the beginning:

(1) Those whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy;

(2) Those which are absolutely simulated or fictitious;

(3) Those whose cause or object did not exist at the time o the transaction;

(4) Those whose object is outside the commerce of men;

(5) Those which contemplate an impossible service;

(6) Those where the intention of the parties relative to the principal object of the contract cannot be ascertained;

(7) Those expressly prohibited or declared void by law.

These contracts cannot be ratified. Neither can the right to set up the defense of illegality be waived.

APPENDIX Z

[Affidavit of Arturo M. Tolentino]

ARTURO M. TOLENTINO, PhB, LLG., LLM., DLL., LL.D (h.c.), citizen and resident of the Republic of the Philippines.

Graduated with highest honor (valedictorian), College of Law, University of the Philippines; obtained Master of Laws and Doctor of Civil Law, both highest honors (meritissimus), from University of Sto. Tomas.

Member, Integrated Bar of the Philippines, Philippine Bar Association, Philippine Lawyers Association, Manila Lawyers, Inc., Philippine Trial Lawyers Association, Philippine Society of International Law. Colegio de Abogados de Madrid (Bar Association of Madrid, Spain), Philippine Constitution Association, Phi Kappa Phi International Honor Society.

Professor of law since 1835 to 1957, in several law institutions, including the University of the Philippines, University of Sto. Tomas, Far Eastern University, University of the East, University of Manila, Philippine Law School, Quezon College, San Sebastian college of law, San Beda college of law. (Specialized in civil law subjects, including Family Relations; stopped teaching due to demands of legislative work after election to the Philippine Senate.)

Elected as congressman, two terms of four (4) years each, as senator, three (3) terms of six years each and one (1) term of three (3) years, and as assemblyman for two terms of six years each. We President of the Senate, and majority leader in the Senate and in the House of Representatives.

Elected and sworn in as Vice President, 1986.

Was Ambassador, minister of state for foreign affairs, and minister of state for foreign affairs, 1973-1985.

Chairman, Philippine delegation to the first, second, and third United Nations Conference on the law of the sea, which produced the international Convention on the Law of the Sea.

Was member of the Code Commission, 1947, which drafted, among others, the present civil code of the Philippines.

Author of several law books, including "Commentaries and Jurisprudence on the Civil Code of the Philippines", in five (5) volumes, published in 1960, with revised editions in 1968, 1974, 1983, 1985, 1987, and reprinted 1990.

Honors and Awards:

President emeritus, Philippine Constitution Association

Most outstanding alumnus, Mapa (East High School, University of Sto. Tomas, University of the Philippines, college Editors Guild.

Outstanding Manilan award in public service, 1994.

Various awards as legal luminary, public servant, legislator, constitutionalist, from several civic, lawyers' and college organizations.

Integrated Bar of the Philippines, most distinguished service award, January, 1994, and lifetimes achievement award, September, 1996, presented by Philippine President Fidel V. Ramos.

Gold medal award for distinguished service to the nation as member of the Code Commission that drafted the Civil

Code of the Philippines, 1948, presented by Philippine President Elpidio Quirino.

Presidential conferment of Grand Mabini Award with the rank of Dakllang Kamanong, June, 1995, by Philippine President Fidel V. Ramos, for "selfless and exemplary contribution in foreign policy and diplomacy,"

after being duly sworn deposes and states under his oath:

Submitted to me for legal opinion is whether the marriage of Nadina Maravilla to Armando Gustilo was valid or void, and if valid, was it subsisting at the time of his death?

The pertinent facts are as follows:

On December 24, 1970, Nadina was married to Francisco Maravilla in Bacolod City, Philippines.

On August 21, 1982, she got married to Armando Gustilo in New Jersey, in the United States.

On March 17, 1983, or seven months after her marriage to Armando Gustilo in New Jersey, Nadina Maravilla filed a pleading under oath in Special Proceeding No. M-130, entitled Maravilla vs. Local Civil Registrar of Makati, Metro Manila, in which she swore that she was then married to Francisco Maravilla.

In her marriage license application for her marriage to Armando Gustilo on August 21, 1982, there was a box which was "checked" by her, indicating that her marriage to Francisco Maravilla had been annulled prior to the date of the application.

On March 12, 1985, she actually obtained in the Philippines the annulment of her marriage to Francisco Maravilla.

In 1986, Armando Gustilo died in Texas.

Nadina Maravilla, Francisco Maravilla, and Armando Gustilo are all citizens and residents of the Philippines.

From these facts, it is very clear that when nadina Maravilla married Armando Gustilo in New Jersey on August 21, 1982, her 1907 marriage to Francisco Maravilla was subsisting, although in her marriage license application she "checked" a box indicating that her marriage to Francisco Maravilla had been previously annulled (an obvious falsity). The truth was what she stated under oath in Spec. Proc. No. M-130, in Makati, Metro Manila, on March 17, 1983 (seven months after her marriage to Armando Gustilo) that she was then married to Francisco Maravilla.

Because she was still married to Francisco Maravilla at the time she contracted marriage with Armando Gustilo, her marriage to Armando Gustilo was bigamous and void.

It is a fundamental principle that the status of a marriage is determined at the time o the celebration of the marriage.

The status of the New Jersey marriage is, generally, determined by the law of the place of celebration (New Jersey). A marriage that is valid in the place of celebration is valid everywhere.

Nadina Maravilla, Francisco Maravilla, and Armando Gustilo, however, are all Filipino citizens.

To a certain extent, the above rule of "a marriage valid where celebrated is valid everywhere" is subject to some exceptions provided in Philippine law.

Article 15 of the Civil Code of the Philippines provides as follows: "Laws relating to family rights and duties, or to the

status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad."

Article 17, last paragraph provides: "Prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgment promulgated, or by determinations or conventions agreed upon in a foreign country."

Under Article 71, of the Civil Code of the Philippines, which was the law in force in 1982, when Nadina Maravilla married Armando Gustilo in New jersey, it was provided:

> "All marriages performed outside the Philippines in accordance with the laws in force in the country where they were performed, and valid there as such, shall also be valid in this country, except bigamous, polygamous, or incestuous marriages as determined by Philippine law."

A bigamous marriage is one where one or both the parties have a prior subsisting marriage. (See the case of Yap vs. Court of Appeals, etc., G.R. No. 40003, Oct. 28, 1986, 145 SCRA 229).

Under these provisions, we cannot avoid the conclusion that the marriage of Nadina Maravilla to Armando Gustilo in New Jersey in 1982, was void from the beginning because it was a bigamous marriage, a complete nullity.

The later (1985) annulment of her previous marriage to Maravilla could not make that 1982 bigamous marriage valid. As already stated, the status of a marriage must be determined at the time of its celebration. The marriage of Nadina to Gustilo in 1983, being void, not only voidable or annullable, but VOID, it cannot be validated by subsequent events or occurrences. A void marriage legally is NON-EXISTENT,

and cannot be validated. The legal capacity of Nadina, which is determined by Philippine law (Arts. 15 and 71, Civil Code, Supra) must be determined at the moment of the celebration of the marriage to Armando Gustilo (1982), and at that time she was not legally qualified to marry anyone else, because she had a subsisting marriage to Maravilla. The fact that in 1985, her marriage to Maravilla was annulled, did not automatically validate her void bigamous marriage of 1982 to Gustilo, which was legally non-existent.

When Armando Gustilo, therefore, died in 1986, Nadina Maravilla was not a surviving spouse.

Done on March ____, 1997, in _____.

ARTURO M. TOLENTINO

SUBSCRIBED AND SWORN to before me in _____, on March _____, 1997, affiant exhibiting Community Tax Cert. No. 5296253E, issued on 2-28-97, in Quezon City.

NOTARY PUBLIC

APPENDIX AA

[Partial Listing (filed in Court of Appeals August 2, 1996) of Foreign Statutes and Cases Discussed in Appellant's Principal Brief]

BRIEF PAGE(S)	REFER-ENCE	DOCU-MENT	RELATES TO:
PHILIPPINE STATUTES			

11	Actual volumes of the Philippine Civil Code and the Family Code of the Philippines have been produced and argued in Court and controlling excerpts filed in these proceedings, together with notices of intent to rely upon Foreign Law. For example: Tr. 138, 139, 914, 967, 7?-96, 445, 1075-1092	Art. 71, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I. Especially Note 7 dealing with marriages void or voidable under the law where performed.	Appellants' contention that the law of the Philippines requires resort to the law of the jurisdiction performing the marriage to determine its validity.

12		Title I, Art. 255, The Family Code of the Philippines Explained, Vol. 2, 1990 Edition, Lizaso. **ERROR: Should be Article 26, Family Code of the Philippines Ann., Nolledo, 1st Ed., 1988**	Continues provisions of Article 71 of Civil Code of the Philippines.
12		Art. 15, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I	Appellants' claim that marriage was void at time of marriage.

12		Art. 71, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I (Interpreting note, page 57, Vol. I)	Appellants' claim that the New Jersey marriage was void because New Jersey law would so declare.

13	Actual volumes of the Philippine Civil Code and the Family Code of the Philippines have been produced and argued in Court and controlling excerpts filed in these proceedings, together with notices of intent to rely upon Foreign Law. For example: Tr. 138, 139, 914, 967, 72-96, 445, 1075-1092	Art. 71, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I (Note 7, found on page 267, Vol. I)	Appellants' claim of invalidity of New Jersey marriage under Philippine law.

14		Art. 61, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I Art. 63, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I	Public policy of Philippines against bigamous marriage and its prevention.

25 26	Actual volumes of the Philippine Civil Code and the Family Code of the Philippines have been produced and argued in Court and controlling excerpts filed in these proceedings, together with notices of intent to rely upon Foreign Law. For example: Tr. 138, 139, 914, 967, 72-96, 445, 1075-1092	Art. 263, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I Title VI, Art. 170, The Family Code of the Philippines, Vol. 2, 1990 Edition, Lizaso Title VI, Art. 166, The Family Code of the Philippines, Vol. 2, 1990 Edition, Lizaso	Action to impugn legitimacy must be brought within prescriptive period and only by the husband. Appellants' claim that Appellees have no standing to question legitimacy.

27		Editorial note, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I, p. 569	Inadmissibility of wife's testimony to impugn child's legitimacy.
27		Title VI, Art. 167, The Family Code of the Philippines, Vol. 2, 1990 Edition, Lizaso Art. 256, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I	Appellee Nadina (Maravilla) Gustilo is incompetent to testify by affidavit against the legitimacy of her child

32	Actual volumes of the Philippine Civil Code and the Family Code of the Philippines have been produced and argued in Court and controlling excerpts filed in these proceedings, together with notices of intent to rely upon Foreign Law. For example: Tr. 138, 139, 914, 967, 72-96, 445, 1075-1092	Art. 402, Civil Code of the Philippines, Paras, 9th Ed., 1978, Vol. I Title X, Art. 234, The Family Code of the Philippines, Vol. 2, 1990 Edition, Lizaso	Deodoco and Mogasa affidavits were by adult eye witnesses, whose jobs and position made them competent to testify as to their personal observations .
NEW JERSEY STATUTES			

12 13		R.S. 37:1-10 N.J.S.A.13	No common law marriage, no rehabilitation of void marriage by living together as man and wife. False representation of material matter to obtain license renders ensuing marriage void.
PHILIPPINE CASES			

2	Gustilo v. Hon. Fernando P. Agdamag, Presiding Judge, Branch 138, Regional Trial Court, CA - G.R. SP. No. 28626, Ct. of App. Phil., 7th Div., February 16, 1993	Decision of Court of Appeals dated 2/16/93	Fixes dates of Maravilla marriage and annulment and name and date of birth of June Salvacion and declares the agreements to be "void ab initio.
3			
7			Error of Court in refusing to give effect to the decision of 2/16/93.

23	Maravilla v. Local Civil Registrar, SP. No. M-130, Regional Trial Court, Republic of the Philippines, Branch CXXXIII (133), Makati, Metro Manila	Decision of Philippine court January 7, 1985	Error of Court in treating findings of Judge Veloso as issue preclusive in this collateral proceeding.
24			Error of Court in treating findings of Judge Veloso as issue preclusive in this collateral proceeding.

26	Macadangdang v. CA, 100 SCRA 73	Decision of Philippine Supreme Court	An action to impugn legitimacy is statutory and may be exercised only in a suit brought directly for such purpose under statutory constraint.
28	Maravilla v. Local Civil Registrar, SP. No. M-130, Regional Trial Court, Republic of the Philippines, Branch CXXXIII (133), Makati, Metro Manila	Decision of Philippine Court January 7, 1985	Error of Court in treating this collateral decision as virtually the entire basis of its decision in this case.

33 34	Gustilo v. Hon. Fernando P. Agdamag, Presiding Judge, Branch 138, Regional Trial Court, CA - G.R. SP. No. 28626, Ct. of App. Phil., 7th Div., February 16, 1993	Decision of Seventh Court of Appeals of the Philippines dated February 16, 1993	Eliminates any basis under Philippine law by which Appellees may stand on the agreements--i.e., Philippine agreements. They fail under Texas law also.
NEW JERSEY CASES			
12	Richards v. Richards, 353 A.2d 141 (NJ 1976)	Decision of New Jersey Superior Court	Gustilo marriage is void as a bigamous marriage that cannot be rehabilitated .
12	Dacunzo v. Edgye, 117 A.2d 508 (NJ Sp. Ct. 1955)	Decision of New Jersey Supreme Court	
13			

APPENDIX BB

[Intentionally omitted]

APPENDIX CC

[Excerpts from Appellants' Brief Containing Sixth Point of Error and Sub-Points]

SIXTH POINT OF ERROR

SIXTH POINT: The Probate Court erred in rulings on motions and evidence, both exclusion and admission, and erred in the conduct of the trial in such a way that the cumulative effects of it resulted in an unfair trial, prejudicial to Appellants and an incorrect and unjust verdict and constituted reversible error.

The prejudicial actions and events included the following, viz:

a. Denying any meaningful sanctions or discovery relief from Appellee, Nadina (Maravilla) Gustilo.

   Ref.: Motion for Sanctions, Tr. 1127; Motion to Strike Affirmative Defenses, Tr. 2172

b. Extreme laxity in evidence requirements which should have been imposed on the testimony and exhibits of Jay Rea. Ref.:

   Ref.: S.F. 1199-1200; S.F. 1166-1172; S.F. 1175-1176

c. Permitting extensive proof of public holding out by Nadina Maravilla and the deceased to imply marriage and cohabitation when under the circumstances of this case such holding out and cohabitation were irrelevant to any issue.

   Ref.: S.F. 768-781

d. Requiring Appellee, Nadina Maravilla to be addressed by the surname Gustilo, when she had no established right to the use of such name.

Ref.: Pretrial Motions S.F. 11 - 12.

e. Rejecting out of hand substantially all purposed jury instructions and questions upon the issues of fraud and fiduciary responsibility and accepting erroneous and onerous instructions that failed to recognize the special fiduciary relationship of the Administratrix to the heirs of the estate
and required positive findings of trickery and overt fraud.

Ref.: Exceptions to Charge Tr. 2224-2253; S.F. 1557-1643.

f. Denied correct instructions of constructive fraud.

Ref.: Exceptions to Charge, Tr. 2224-2233; S.F. 1557-1643.

g. Denied correct instructions requiring proof by the former administratrix of full disclosure.

Ref.: Exceptions to Charge, Tr. 2238-2240; S.F. 1557-1643.

h. Refusing to require a consistent position by Appellees on such matters or the domicile of the decedent, the bare facts of the Maravilla marriage, whether the claims of status and heirship by Appellees were under Texas, New Jersey or Philippine law and whether they related to a ceremonial or common law marriage and what jurisdiction the marriage was alleged to have occurred in. Whether or not June Gustilo was contending to be a natural child, spurious child, a legitimate child, or an illegitimate child and under

what laws of which jurisdiction where the claims being made.

i. Refused to enforce discovery to determine the source of approximately 1.4 million of funds said to have been paid to Appellants treated by Jay Rea as having been estate funds and by Nadina Gustilo as having been her private funds.

Ref.: Motion for Sanctions, Tr. 1127; Ad Litem Exhibit 51.

j. The refusal of the Court to grant meaningful sanctions or to strike the pleadings or affirmative claims and defenses of Nadina Gustilo for never answering questions regarding such funds. See a and i supra.

APPENDIX DD

[Excerpts from 61 Stat 1174: Treaties and Other International Acts Series 1568. *Treaty of General Relations Between the United States of America and the Republic of the Philippines.*]

. . .

[Text Omitted]

The property rights of citizens . . . of the Republic of the Philippines in the United States of America shall be acknowledged, respected and safeguarded to the same extent as property rights of citizens . . . of the United States of America.

APPENDIX EE

[Listing of Numerous Motions Urging Probate Court to Acknowledge and Apply Philippine Law]

PLACES WHERE PROBATE COURT WAS ADVISED OF FOREIGN LAW

1. *Second Motion for Partial Summary Judgment Denying Heirship Claim of Nadina (Maravilla) Gustilo or Alternatively for an Order Under Rule 166a(e) T.R.C.P. Setting Forth All Facts Found and Conclusions of Law Upon Which Such Motion is Denied. This Motion is Field by Jose Vicente Gustilo, III and Milagros Barco as the Guardian and Next Friend of Mary Joy Gustilo.* (Tr. 954. Filed 03/08/93 in Probate Court.) **Notice of Gustilo v. Agdamag at p. 2 (Tr. 955). Non-specific reference made to Philippine Civil Code in fn.2 on p.11 (Tr. 964). Section called "Notice of Foreign Law" at p.14 (Tr. 967) refers to a Notice of Foreign Law and authorities attached to motion as Exhibit I (Tr. 1049) (Notice mentions Baluyut, Gustilo v. Agdamag, and De Castro).**

2. *Motion to Set Aside Partial Summary Judgment Approving Heirship Claim of June Salvacion Gustilo and Cross-Motion for Partial Summary Judgment for Denial of the Heirship Claim of June Salvacion Gustilo.* (Tr. 1499. Filed 03/25/93.) **Section 5 of Act No. 3752 and Article 280 of the Civil Code of the Republic of the Philippines at p.3 (Tr. 1501). Reference to Baluyat at pp.4 and 8 (Tr. 1502 and 1506). Gustilo v. Agdamag at pp.5-6, 9 (Tr. 1503-1504, 1507). Article 2035 at pp.5-6 (Tr. 1503-1504). Article 412 Philippine Civil Code p.7 (Tr. 1505). De Castro p.7 (Tr. 1505). Swore in attached affidavit that opposing counsel supplied true and correct copies of foreign authority p.4 (Tr. 1511).**

3. *Brief in Support of Motion to Strike, Exceptions and Opposition to Tendered Affidavits Offered by June Salvacion, Who Calls Herself Gustilo, Through Her Attorney, Ad Litem, Joseph Horrigan.* (Tr. 1976. Filed 04/02/92.) **Non-specific reference to "Philippine law" laying out factual issues under Philippine law regarding impossibility of access. p.1-2 (Tr. 1976-1977). Macadangdang pp.3, 6, 10 (Tr. 1978, 1981, 1985). Family Code of the Philippines Article 167 pp.3, 7 (Tr. 1978, 1982). Article 255 Philippine Civil Code p.4 (Tr. 1979). Article 166 Family Code p.4 (Tr. 1979). Sempio-Diy p.4 (Tr. 1979). Article 164 and 166 of Family Code p.4 (Tr. 1980). Article 170 Family Code pp.6, 8 (Tr. 1981, 1983). Article 263, Civil Code pp.6, 8 (Tr. 1981, 1983). Article 256 Family Code p.7 (1982).**

4. *Motion to Strike and Their Exceptions to Certain Tendered Affidavits Offered by June Salvacion Who Calls Herself Gustilo, Through Her Attorney Ad Litem, Joseph Horrigan.* (Tr. 2002. Filed 04/02/93.) **Article 170, Family Code pp.2-4 (Tr. 2003-2005). Article 263, Civil Code pp.2-3 (Tr. 2003, 2004). Macadangdang p.4 (Tr. 2005). Article 256, Civil Code pp.5 (Tr. 2006, 2010). Article 167, Family Code pp.5, 9 (Tr. 2006, 2010). Article 166 Family Code p.6 (Tr. 2007).**

5. *Exceptions and Motion in Opposition to Tendered Affidavits and Exhibits Accompanying the Response of Nadina G. Gustilo to the Second Motion for Partial Summary Judgment Filed by Jose Vicente Gustilo, III and Milagros Barco and Guardian and Next Friend of Mary Joy Gustilo.* (Tr. 2032. Filed 04/05/93.) **Article 2035, Civil Code p.9 (Tr. 2040). Gustilo v. Agdamag pp. 9, 14 (Tr. 2040, 2045). Articles 170 and 171, Philippine Code, pp.10, 12 (Tr. 2041, 2043). Bartolome, De Castro p. 12 (Tr. 2043). Articles 3753 and 280, Civil Code p.13 (Tr. 2044). Roces v. Local Registrar,**

Crisolo v. Macadaong, and Barnebe v. Lacodin, p.13 (Tr. 2044).

6. *Motion for the Introduction Into Evidence of Admissions of Nadina Gustilo.* (Tr. 2071. Filed 04/22/93.) **Maravilla v. Local Civil Registrar p. 3 (Tr. 2073) (Petition attached as Tr. 2081-2087).**

7. *First Amended Motion for Judgment for Jose Vicente Gustilo, III, and mary Joy Ann Gustilo By Her Guardian Milagros Barco as a Matter of Law and Disregarding Jury Answers To All Questions Or Alternatively for Judgment Upon the Jury Verdict in Respect to Certain Answers and Disregarding Jury Answers to Certain Jury Questions.* (Tr. 2262. Filed 05/19/93.) **Gustilo v. Agdamag, p.4 (Tr. 2265) and throughout. Non-specific reference to Philippine Family Code and to Philippine Civil Code p.34 (Tr. 2295).**

8. *Opposition to Motion for Entry of Order Granting June S. Gustilo's Second Motion for Partial Summary Judgment.* (Tr. 2315. Filed 06/07/93.) **Non-specific reference to Philippine law re: mother testifying against child's legitimacy, p.3 (Tr. 2317). Court requested to note Philippine law court in ex parte proceeding, p.4 (Tr. 2318).**

9. *Motion in Limine.* (Tr. 2051. Filed 04/05/93.) **Article 2035, Civil Code p.2 (Tr. 2052). Gustilo v. Agdamag pp.2, 6 (Tr. 2052, 2056). Article 170 Philippine Civil Code pp.3,4,7 (Tr. 2053, 2054, 2057). Article 171 Philippine Civil Code pp.3,4 (Tr. 2053, 2054). Section 5 of Act 3753, Civil Registry Law of the Philippines, p.4 (Tr. 2054). Roces v. Local Registrar, Crisolo v. Madagaong, Barnebe v. Lacodin, Reyes v. CA, Bartolome, De Castro p.4 (Tr. 2054). Article 167, Family Code pp.5, 7 (Tr. 2055, 2057). Article 256, Civil Code p.5 (Tr. 2055). Article 164, Family Code**

p.7 (Tr. 2057). Article 263, Civil Code p. 7 (Tr. 2057).

10. *Motion for Special Instruction.* (Tr. 2254. Filed 04/27/93.) **". . . such a result is forbidden by the laws of every jurisdiction having any relationship to the question. See Motion in Limine and Motion To Exclude and Bar Testimony. In this latter Motion amply [sic] authority is cited." p.2 (Tr. 2255).**

ALSO,

Charles' argument against admission of agreements (S.F. 559-565).

Request agreements and related questions be withdrawn from submission to jury (S.F. 492); denied by court (S.F. 494).

Motion for partial instructed verdict - Motion in Limine (S.F. 487-484, esp. 493).

APPENDIX FF

[Index to Appendix of Foreign Authority
filed in Court of Appeals August 2, 196]

BRIEF PAGE(S)	REFER-ENCE	DOCU-MENT	RELATES TO:
PHILIPPINE STATUTES			

11	Actual volumes of the Philippine Civil Code and the Family Code of the Philippines have been produced and argued in Court and controlling excerpts filed in these proceedings, together with notices of intent to rely upon Foreign Law. For example: Tr. 138, 139, 914, 967, 72-96, 445, 1075-1092	Art. 71, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I. Especially Note 7 dealing with marriages void or voidable under the law where performed.	Appellants' contention that the law of the Philippines requires resort to the law of the jurisdiction performing the marriage to determine its validity.

12		Title I, Art. 255, The Family Code of the Philippines Explained, Vol. 2, 1990 Edition, Lizaso. **ERROR: Should be Article 26, Family Code of the Philippines Ann., Nolledo, 1st Ed., 1988**	Continues provisions of Article 71 of Civil Code of the Philippines.
12		Art. 15, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I	Appellants' claim that marriage was void at time of marriage.

12		Art. 71, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I (Interpreting note, page 57, Vol. I)	Appellants' claim that the New Jersey marriage was void because New Jersey law would so declare.

13	Actual volumes of the Philippine Civil Code and the Family Code of the Philippines have been produced and argued in Court and controlling excerpts filed in these proceedings, together with notices of intent to rely upon Foreign Law. For example: Tr. 138, 139, 914, 967, 72-96, 445, 1075-1092	Art. 71, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I (Note 7, found on page 267, Vol. I)	Appellants' claim of invalidity of New Jersey marriage under Philippine law.

14		Art. 61, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I Art. 63, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I	Public policy of Philippines against bigamous marriage and its prevention.

25 26	Actual volumes of the Philippine Civil Code and the Family Code of the Philippines have been produced and argued in Court and controlling excerpts filed in these proceedings, together with notices of intent to rely upon Foreign Law. For example: Tr. 138, 139, 914, 967, 72-96, 445, 1075-1092	Art. 263, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I Title VI, Art. 170, The Family Code of the Philippines, Vol. 2, 1990 Edition, Lizaso Title VI, Art. 166, The Family Code of the Philippines, Vol. 2, 1990 Edition, Lizaso	Action to impugn legitimacy must be brought within prescriptive period and only by the husband. Appellants' claim that Appellees have no standing to question legitimacy.

27		Editorial note, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I, p. 569	Inadmissibility of wife's testimony to impugn child's legitimacy.
27		Title VI, Art. 167, The Family Code of the Philippines, Vol. 2, 1990 Edition, Lizaso Art. 256, Civil Code of the Philippines Ann., Paras, 9th Ed., 1978, Vol. I	Appellee Nadina (Maravilla) Gustilo is incompetent to testify by affidavit against the legitimacy of her child

32	Actual volumes of the Philippine Civil Code and the Family Code of the Philippines have been produced and argued in Court and controlling excerpts filed in these proceedings, together with notices of intent to rely upon Foreign Law. For example: Tr. 138, 139, 914, 967, 72-96, 445, 1075-1092	Art. 402, Civil Code of the Philippines, Paras, 9th Ed., 1978, Vol. I Title X, Art. 234, The Family Code of the Philippines, Vol. 2, 1990 Edition, Lizaso	Deodoco and Mogasa affidavits were by adult eye witnesses, whose jobs and position made them competent to testify as to their personal observations .
NEW JERSEY STATUTES			

12 13		R.S. 37:1-10 N.J.S.A.13	No common law marriage, no rehabilitation of void marriage by living together as man and wife. False representation of material matter to obtain license renders ensuing marriage void.
PHILIPPINE CASES			

2	Gustilo v. Hon. Fernando P. Agdamag, Presiding Judge, Branch 138, Regional Trial Court, CA - G.R. SP. No. 28626, Ct. of App. Phil., 7th Div., February 16, 1993	Decision of Court of Appeals dated 2/16/93	Fixes dates of Maravilla marriage and annulment and name and date of birth of June Salvacion and declares the agreements to be "void ab initio.
3			
7			Error of Court in refusing to give effect to the decision of 2/16/93.

23	Maravilla v. Local Civil Registrar, SP. No. M-130, Regional Trial Court, Republic of the Philippines, Branch CXXXIII (133), Makati, Metro Manila	Decision of Philippine court January 7, 1985	Error of Court in treating findings of Judge Veloso as issue preclusive in this collateral proceeding.
24			Error of Court in treating findings of Judge Veloso as issue preclusive in this collateral proceeding.

26	Macadangdang v. CA, 100 SCRA 73	Decision of Philippine Supreme Court	An action to impugn legitimacy is statutory and may be exercised only in a suit brought directly for such purpose under statutory constraint.
28	Maravilla v. Local Civil Registrar, SP. No. M-130, Regional Trial Court, Republic of the Philippines, Branch CXXXIII (133), Makati, Metro Manila	Decision of Philippine Court January 7, 1985	Error of Court in treating this collateral decision as virtually the entire basis of its decision in this case.

33 34	Gustilo v. Hon. Fernando P. Agdamag, Presiding Judge, Branch 138, Regional Trial Court, CA - G.R. SP. No. 28626, Ct. of App. Phil., 7th Div., February 16, 1993	Decision of Seventh Court of Appeals of the Philippines dated February 16, 1993	Eliminates any basis under Philippine law by which Appellees may stand on the agreements--i.e., Philippine agreements. They fail under Texas law also.
	NEW JERSEY CASES		
12	Richards v. Richards, 353 A.2d 141 (NJ 1976)	Decision of New Jersey Superior Court	Gustilo marriage is void as a bigamous marriage that cannot be rehabilitated.
12	Dacunzo v. Edgye, 117 A.2d 508 (NJ Sp. Ct. 1955)	Decision of New Jersey Supreme Court	
13			

APPENDIX GG

[Exception to Defendant's Offer of ALJG38 and ALGJ39]

[Note: Duplicate of Appendix X]

Ms. Charles: Thank you, Your Honor.

Defendant's 38, the compromise and settlement agreement between Nadina Gustilo and June Salvacion Gustilo and Jose Vicente Gustilo III and the compromise and settlement agreement and addendum thereto between Nadina Gustilo and June Salvacion Gustilo and Milagros Barco as guardian and next friend of Mary Joy Ann Gustilo, we object to the admission of those documents on the basis that the court of appeals' opinion recently issued in the Philippines is the law of the case.

The Court: I will overrule that. I find that the Philippine judgment is not final and that this Court does not have to give it full faith and credit.

Ms. Charles: We also object to the same documents on the basis of estoppel by judgment.

Mr. Horrigan: I would like to interpose an objection to the manner in which Ms. Charles is doing this. She came up here and said she wanted to make a bill of exception. The bill of exception is to be utilized when evidence proffered by a party is excluded by the Court. Then a bill of exception is used to put on that evidence.

What we have here is evidence admitted by this Court, and she raised her objection at

the time. The Court admitted the document and overruled it. She apparently now wants a second go-round, throwing up further objections. This is not the proper time or place or anything else for a bill of exception, so I would object to it on that basis.

The Court: I will overrule your objection. Go ahead, Counsel.

Ms. Charles: Your Honor, we further object to the admission of the compromise and settlement agreement and their addendum on the basis of res judicata.

The Court: Overruled for the same reason, Counsel.

Ms. Charles: We further object to the admission of the compromise and settlement agreement and their addendum on the basis that the contracts are ruled by Philippine law and thus Philippine law is the law of the case. The judgment in the Philippines is currently the law of that case.

The Court: All right. I will overrule that, that the Philippine judgment isn't final and the Court is not required to give it full faith and credit.

Ms. Charles: We further object to the admission of the compromise and settlement agreement and any addendum thereto comprised as part of Defendant's Exhibit 38 because comity should be afforded to the Philippine decision.

The Court: I will deny comity to the Philippine decision.

APPENDIX HH

(Partial Summary Judgment in Heirship Proceeding entered in Probate Court No. 1)

PARTIAL SUMMARY JUDGMENT IN HEIRSHIP PROCEEDING

BE IT REMEMBERED that on April 30, 1992, the court heard the Motion for Partial Summary Judgment in Heirship Proceeding filed in this cause by June Salvacion Gustilo, a Minor, by and through her duly appointed attorney ad litem. The parties appeared by and through their respective counsel. The Court examined the pleadings, the Motion for Partial Summary Judgment, the responses thereto, and the summary judgment evidence, including the admissions, affidavits and authenticated or certified public records on file at the time of the hearing. Having examined such summary judgment evidence, and having heard the argument of counsel, the Court finds that the following uncontroverted facts exist:

1. That on January 1, 1985, the Honorable Rosario R. Veloso, Judge of the Regional Trial Court of the Republic of the Philippines, in Makati, Metro Manila, signed an Order in Cause No. Sp. Proc. No. M-130, styled "Nadina G. Maravilla, Petitioner v. Local Civil Registrar of Makati, Metro Manila, Respondent."

2. That a properly authenticated copy of said Order was attached to Movant's Motion for Partial Summary Judgment, through the Affidavit of Joseph S. Horrigan, attached to such Motion for Partial Summary Judgment.

3. That Armando C. Gustilo is the father of June Salvacion Gustilo.

4. That June Salvacion Gustilo is the daughter of Armando C. Gustilo, Deceased.

5. That any presumption that the biological father of June Salvacion Gustilo was Francisco J. Maravilla, Jr., was rebutted by the Order o the Philippine Court referred to

above, dated January 7, 1985, which established the paternity of June Salvacion Gustilo by Armando C. Gustilo.

The Court is of the opinion and finds that Section 12.02 of the Texas Family Code is applicable with respect to the issues before the Court in this proceeding.

The Court is of the further opinion, and further finds that there is no genuine issue of material fact on the issue of whether June Salvacion Gustilo is a lawful heir of the Decedent, Armando C. Gustilo, and June Salvacion Gustilo, the moving party is entitled to judgment as a matter of law on such issue.

It is, therefore, ORDERED, ADJUDGED AND DECREED that at the trial of this cause, the findings of the Court, set forth above, are established as facts without the need of further formal proof.

If is further ORDERED, ADJUDGED AND DECREED that June Salvacion Gustilo, a Minor, whose present place of residence is in the State of New Jersey, be and she is hereby declared to be an heir of the Decedent, Armando C. Gustilo and, as a lawful heir, she is entitled to inherit from the Estate of Armando C. Gustilo, Deceased.

It is further ORDERED, ADJUDGED AND DECREED that the issue of the share and interest of June S. Gustilo in the real and personal property of such Decedent is hereby reserved for trial on the merits in this cause.

SIGNED this 1st day of June, 1992.

/s/

JUDGE, PROBATE COURT NO. 1
OF HARRIS COUNTY, TEXAS

APPROVED AS TO FORM AND SUBSTANCE:

. . .

[Approving Signatures Omitted]

APPENDIX II

(Federal Statutes)

42 USC § 1983:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

28 USC § 1257(a):

(a) Final judgments or decrees rendered by the highest court of a Sate in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the round of its being repugnant to the Constitution, treaties, or laws of the united States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Judiciary Act of 1789:

Sec. 9. *And be it further enacted,* That the district courts shall have exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the Untied States, committed within their respective districts . . .. And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where in alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid.

Sec. 13. *And be it further enacted,* That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations . . .. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

Sec. 25. *And be it further enacted,* That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any Sate, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, amy at their discretion, if the cause shall have been once remanded before proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

APPENDIX JJ

[Supreme Court Rules 10(b), (c)]

Rule 10

CONSIDERATIONS GOVERNING
REVIEW ON CERTIORARI

. . .

[Text Omitted]

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

APPENDIX KK

[Texas Family Code, Sections 2.22 and 12.02]

Section 2.22:

§ 2.22. Marriage During Existence of Prior Marriage

A marriage is void if either party was previously married and the prior marriage is not dissolved. However, the marriage becomes valid when the prior marriage is dissolved if since that time the parties have lived together as husband and wife and represented themselves to others as being married.

Acts 1969, 61st Leg., p.2707, ch. 888, § 1, eff. Jan. 1, 1970.

Section 12.02:

§ 12.02. Presumption of Paternity

(a) A man is presumed to be the biological father of a child if:

(1) he and the child's biological mother are or have been married to each other and the child is born during the marriage or not more than 300 days after the date the marriage terminated by death, annulment, divorce, or by having been declared void;

(2) before the child's birth, he and the child's biological mother attempted to marry each other by a marriage in apparent compliance with law, although the attempted marriage is or could be declared void, and the child is born during the attempted marriage or not more than 300 days after the date the attempted marriage terminated by death, annulment, divorce, or by having been declared void;

(3) after the child's birth, he and child's biological mother have married or attempted to marry each other by a marriage

in apparent compliance with law, although the attempted marriage is or could be declared void or voided by annulment, and:

(A) he has filed a written acknowledgment of his paternity of the child under Chapter 13 of this code;

(B) he consents in writing to be named and is named as the child's father on the child's birth certificate; or

(C) he is obligated to support the child under a written voluntary promise or by court order;

(4) without attempting to marry the mother, he consents in writing to be named as the child's father on the child's birth certificate; or

(5) before the child reaches the age of majority, he receives the child into his home and openly holds out the child as his biological child.

(b) A presumption under this section may be rebutted only by clear an convincing evidence. It two or more presumptions arise that conflict, the presumption that is founded on the weightier consideration s of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

Amended by Acts 1987, 70th Leg., ch. 689, § 4, eff. June 18, 1987; Acts 1989, 71st Leg., ch. 375, § 6, eff. Sept. 1, 1989.

APPENDIX LL

[Tex.R.App.P. 90(a)]

"RULE 90. OPINIONS, PUBLICATION AND CITATION

"(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion."

APPENDIX MM

[New Jersey Statute]

R.S. 37:1-10. N.J.S.A.:

37:1-10. Common law and other marriages without license; validity

Nothing in this chapter shall be deemed or taken to render any common law or other marriage, otherwise lawful, contracted before December first, nineteen hundred and thirty-nine, invalid by reason of the failure to take out a license as herein provided. But no marriage contracted on and after December first, nineteen hundred and thirty-nine, shall be valid unless the contracting parties shall have obtained a marriage license as required by section 37:1-2 of this Title, and unless, also, the marriage, after license duly issued therefor, shall have been performed by or before any person, religious society, institution or organization authorized by section 37:1-13 of this Title to solemnize marriages; and failure in any case to comply with both prerequisites aforesaid, which shall always be construed as mandatory and not merely directory, shall render the purported marriage absolutely void.

As amended L.1939, c. 227, p. 624, § 1, eff. July 18, 1939.

(4)

No. 97-136

Supreme Court, U.S.
FILED
AUG 11 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,

Petitioners,

v.

NADINA (MARAVILLA) GUSTILO, Individually and as Former Administratrix of The Estate of Armando C. Gustilo, Deceased, and as Guardian of June Salvacion (Maravilla) Gustilo; JOSEPH S. HORRIGAN, as Guardian Ad Litem and Attorney Ad Litem of June Salvacion Gustilo; and the KANALY TRUST COMPANY, as Administrator of the Estate of Armando C. Gustilo, Deceased,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Judicial District Of Texas At Houston

BRIEF OF RESPONDENT JOSEPH S. HORRIGAN, ATTORNEY AD LITEM FOR JUNE S. GUSTILO, IN OPPOSITION

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30 pp

QUESTIONS PRESENTED FOR REVIEW

A. IS A FEDERAL QUESTION PRESENTED WHEN PETITIONERS' CRITICISM OF A 1985 PHILIPPINE COURT ORDER CONSTITUTES A COLLATERAL ATTACK ON THAT 1985 ORDER?

B. IS A FEDERAL QUESTION PRESENTED WHEN TEXAS COURTS HAVE VALID REASONS UNDER TEXAS LAW FOR DECLINING TO GIVE PRECLUSIVE EFFECT TO A JUDGMENT BY A PHILIPPINE APPELLATE COURT?

C. IS A FEDERAL QUESTION PRESENTED WHERE A TEXAS APPELLATE COURT'S REFUSAL TO ADDRESS THE ALLEGED MERITS OF AN ASSIGNMENT OF ERROR IN PETITIONERS' BRIEF TO THAT COURT IS BASED UPON ESTABLISHED TEXAS LAW THAT AN APPELLATE COURT MAY DISREGARD AN ASSIGNMENT OF ERROR WHICH IS MULTIFARIOUS?

D. ASSUMING *ARGUENDO* THAT ONE OR MORE FEDERAL QUESTIONS HAVE NOW BEEN PROPERLY FRAMED, DOES THIS COURT HAVE JURISDICTION TO EXERCISE ITS APPELLATE POWER OVER STATE COURT JUDGMENTS, WHERE THE FEDERAL QUESTIONS WERE NEITHER PRESERVED NOR DECIDED IN THE STATE COURTS?

E. ASSUMING *ARGUENDO* THAT ONE OR MORE FEDERAL QUESTIONS WERE PROPERLY PRESERVED OR DECIDED IN THE STATE COURTS, DOES THIS COURT HAVE JURISDICTION TO REVIEW THE CASE WHERE THE STATE COURT JUDGMENTS REST UPON INDEPENDENT STATE LAW GROUNDS?

LIST OF PARTIES

The parties to the proceeding below set forth in the caption are as follows:

1. Mary Joy Ann Gustilo
2. Jose Vicente Gustilo, III
3. Nadina Maravilla Gustilo
4. Joseph S. Horrigan
5. June Salvacion Gustilo
6. Kanaly Trust Company

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

MISSTATEMENTS BY PETITIONERS 1

RESPONDENT'S STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 2

A. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN PETITIONERS' CRITICISM OF A 1985 PHILIPPINE COURT ORDER CONSTITUTES A COLLATERAL ATTACK ON THAT 1985 ORDER 2

B. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN TEXAS COURTS HAD VALID REASONS UNDER TEXAS LAW FOR DECLINING TO GIVE PRECLUSIVE EFFECT TO A JUDGMENT BY PHILIPPINE APPELLATE COURT 2

C. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHERE A TEXAS APPELLATE COURT DECLINED TO ADDRESS THE ALLEGED MERITS OF AN ASSIGNMENT OF ERROR IN PETITIONERS' BRIEF TO THAT COURT ON THE GROUND THAT THE ASSIGNMENT OF ERROR WAS MULTIFARIOUS 3

TABLE OF CONTENTS – Continued

Page

D. ANY FEDERAL QUESTIONS NOW RAISED BY PETITIONERS WERE NEITHER PRESERVED NOR DECIDED IN THE STATE COURTS AND, ACCORDINGLY, THIS COURT'S JURISDICTION MAY NOT NOW BE INVOKED..... 3

E. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS CASE WHERE THE STATE COURT JUDGMENTS REST UPON INDEPENDENT STATE LAW GROUNDS..... 3

ARGUMENTS AND AUTHORITIES..... 3

A. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN PETITIONERS' CRITICISM OF A 1985 PHILIPPINE COURT ORDER CONSTITUTES A COLLATERAL ATTACK ON THAT 1985 ORDER 3

B. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN TEXAS COURTS HAD VALID REASONS UNDER TEXAS LAW FOR DECLINING TO GIVE PRECLUSIVE EFFECT TO A JUDGMENT BY PHILIPPINE APPELLATE COURT 8

C. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHERE A TEXAS APPELLATE COURT DECLINED TO ADDRESS THE ALLEGED MERITS OF AN ASSIGNMENT OF ERROR IN PETITIONERS' BRIEF TO THAT COURT ON THE GROUND THAT THE ASSIGNMENT OF ERROR WAS MULTIFARIOUS..... 11

TABLE OF CONTENTS – Continued

Page

D. ANY FEDERAL QUESTIONS NOW RAISED BY PETITIONERS WERE NEITHER PRESERVED NOR DECIDED IN THE STATE COURTS AND, ACCORDINGLY, THIS COURT'S JURISDICTION MAY NOT NOW BE INVOKED..... 14

E. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS CASE WHERE THE STATE COURT JUDGMENTS REST UPON INDEPENDENT STATE LAW GROUNDS..... 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 16

Berry v. Humble Oil & Refining Co., 205 S.W.2d 376 (Tex. Civ. App. – Waco 1947, writ ref'd n.r.e.)..... 7

Bethel v. Norman Furniture Co., Inc., 756 S.W.2d 6 (Tex. App. – Houston [1st Dist.] 1988, no writ) 11

Brazzel v. Murray, 481 S.W.2d 801 (Tex. 1972)..... 6

Employers Casualty Co. v. Block, 744 S.W.2d 940 (Tex. 1988) 5, 6

Ex parte Tyler, 261 S.W.2d 833 (Tex. 1953) 6

Exxon Corp. v. Eagerton, 462 U.S. 176 n.3 (1983) 15

Gunter v. Glasgow, 608 S.W.2d 273 (Tex. Civ. App. – Eastland 1980, no writ)..... 10

Herb v. Pitcairn, 324 U.S. 117 (1945)..... 18

Interfirst Bank – Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864 (Tex. App. – Houston [1st Dist.] 1985, error ref'd n.r.e.)..... 10

Leal v. Aluminum Company of America, 443 S.W.2d 942 (Tex. Civ. App. – Corpus Christi 1969, no writ) 12

Minuteman Press Int'l v. Sparks, 782 S.W.2d 339 (Tex. App. – Fort Worth 1989, no writ) 6

Nowell v. Nowell, 408 S.W.2d 550, error dismissed, *cert. denied*, 88 S.Ct. 53 U.S. 847 L.Ed.2d 116 10

Radio Station WOW v. Johnson, 3826 U.S. 120 (1945) 17

TABLE OF AUTHORITIES – Continued

Page

Ray v. Chisum, 260 S.W.2d 118 (Tex. Civ. App. – Texarkana 1953, writ ref'd n.r.e.) 7

Rio Delta Land Co. v. Johnson, 566 S.W.2d 710 (Tex. Civ. App. – Corpus Christi 1978, no writ) 12, 14

Street v. New York, 394 U.S. 576 (1969) 15

Sutherland v. Cobern, 843 S.W.2d 127 (Tex. App. – Texarkana 1992, no writ) 10

Wagner v. Foster, 161 Tex. 333 S.W.2d 887 (1960) 13

STATUTES AND RULES

28 U.S.C. § 1257(a) 16

Sup. Ct. R. 14.1(g)(i) 14, 15

Sup. Ct. R. 14.4 12

Tex. Civ. Prac. & Rem. Code § 36.007 10

Tex. Fam. Code § 12.02 1

Tex. R. App. P. 74(d) 12

Tex. R. App. P. 90(a) 12

Tex. R. App. P. 131(e) 16

I.

MISSTATEMENTS BY PETITIONERS

In their Petition for a Writ of Certiorari, the Petitioners make misstatements of fact, or misstatements of fact and law, which should be called to the attention of the Court. Such misstatements include the following:

1. Petitioners reproduce, as Appendix HH to their Petition, a partial summary judgment in heirship proceeding signed by the Texas trial court on June 1, 1992. In the body of their Petition, at pages 12, 17 and 28, Petitioners continually state that the trial court based its partial summary judgment that June S. Gustilo was a daughter and heir of Armando Gustilo upon Section 12.02 of the Texas Family Code. Petitioners then argue that Philippine law, rather than the Texas Family Code, should have been applied by the Texas trial judge in making such a determination. Petitioners have ignored the fact that the partial summary judgment of June 1, 1992 was later superseded by a second partial summary judgment by the same trial judge, signed on June 8, 1993. That second partial summary judgment, which is set forth in its entirety in Appendix I to this Brief, makes no reference to Section 12.02 of the Texas Family Code. When the partial summary judgment of June 1, 1992 was signed, it was based upon the premise that Armando Gustilo, the Decedent, was a domiciliary of Texas. Thereafter, on December 10, 1992, the probate court found Armando Gustilo to have been a Philippine domiciliary (See Petition, page 11). This fact necessitated a second motion for partial summary judgment by June Gustilo, resulting in the partial summary judgment of June 8, 1993 (Appendix I to this

Brief), in which no mention is made of Section 12.02 of the Texas Family Code.

2. On page 6 of their Petition, Petitioners declare that they "seek to retain titles to properties that devolved to them under Philippine law from their deceased father, Armando Gustilo . . . ". In making that statement, Petitioners ignore the fact that the jury in this case found that they had waived and released their rights to inherit from the Decedent, when they received cash and property in 1988 having a combined total value in excess of $1.3 million. (Texas court of appeals Opinion, Appendix D to Petition, at page A-6).

II.

RESPONDENT'S STATEMENT OF THE CASE

Respondent Horrigan, as Attorney Ad Litem for June S. Gustilo, adopts the factual statements set forth in the opinion of the Texas court of appeals, set forth in Appendix D to the Petition, as his own statement of the case.

III.

REASONS FOR DENYING THE WRIT

A. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN PETITIONERS' CRITICISM OF A 1985 PHILIPPINE COURT ORDER CONSTITUTES A COLLATERAL ATTACK ON THAT 1985 ORDER.

B. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN TEXAS COURTS HAD VALID REASONS UNDER TEXAS LAW FOR DECLINING TO GIVE

PRECLUSIVE EFFECT TO A JUDGMENT BY PHILIPPINE APPELLATE COURT.

C. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHERE A TEXAS APPELLATE COURT DECLINED TO ADDRESS THE ALLEGED MERITS OF AN ASSIGNMENT OF ERROR IN PETITIONERS' BRIEF TO THAT COURT ON THE GROUND THAT THE ASSIGNMENT OF ERROR WAS MULTIFARIOUS.

D. ANY FEDERAL QUESTIONS NOW RAISED BY PETITIONERS WERE NEITHER PRESERVED NOR DECIDED IN THE STATE COURTS AND, ACCORDINGLY, THIS COURT'S JURISDICTION MAY NOT NOW BE INVOKED.

E. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS CASE WHERE THE STATE COURT JUDGMENTS REST UPON INDEPENDENT STATE LAW GROUNDS.

IV.

ARGUMENTS AND AUTHORITIES

A. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN PETITIONERS' CRITICISM OF A 1985 PHILIPPINE COURT ORDER CONSTITUTES A COLLATERAL ATTACK ON THAT 1985 ORDER.

Petitioners seek to invoke this Court's jurisdiction by arguing in their Petition that the Texas courts "refused to give credit and effect to Philippine statutory and case authority . . . ". (Petition, page 3). This argument, to the extent it affects the status of June S. Gustilo as a daughter and heir of Armando Gustilo, appears to be based on the

premise that a 1985 order by a Philippine trial judge, which declared June S. Gustilo to be the daughter of Armando Gustilo and ordered June's birth certificate changed to reflect that fact, was contrary to Philippine law. This argument is nothing more than an effort to collaterally attack a final judgment of a Philippine court, signed twelve (12) years ago.

As the Texas court of appeals pointed out in its opinion, a Philippine trial court signed an order in 1985 which found Armando C. Gustilo to be the father of June Salvacion Gustilo, and which directed the Civil Registrar in Manila to correct the child's birth certificate so that her surname would be changed from "Maravilla" to "Gustilo", and so that her father would be reflected on the corrected birth certificate to be Armando C. Gustilo (Texas court of appeals Opinion, Appendix D, pages A-17 through A-19). This 1985 Philippine Court Order, which was not appealed and which was, therefore, a *final* judgment under any definition, was one of several documents submitted to the probate court by June Gustilo in support of her second motion for partial summary judgment.

In affirming the probate court's partial summary judgment declaring June S. Gustilo to be a daughter and heir of the Decedent, the Texas court of appeals found it unnecessary to consider any summary judgment evidence submitted by June Gustilo except the 1985 Philippine final order, finding that "the order of the Philippine trial court standing alone was sufficient to establish that June is the child and heir of Gustilo as a matter of law." (Texas court of appeals Opinion, Appendix D, page A-17).

The arguments by Petitioners that the 1985 order was rendered "ex parte" and that it conflicts with Philippine law are not only factually inaccurate but are entirely misplaced. Relevant portions of the 1985 order are set forth in the Opinion of the Texas court of appeals. It is recited in that order that **"proper notice"** of the proceeding had been given "to the Office of the Solicitor General, the Local Civil Registrar of Makati, Metro Manila, as well as **respondents Francisco J. Maravilla and Armando C. Gustilo** . . . " (Texas court of appeals Opinion, Appendix D, page A-17). Petitioners' contention that June S. Gustilo was not represented before the Philippine trial court begs the question; only June S. Gustilo has standing to complain about any lack of representation when she was found to be Armando Gustilo's child in 1985. June, who is now an adult, not only did not raise such a complaint in the Texas probate court but, through her attorney ad litem, she urged that the 1985 order established, as a matter of law, that she was the child of Armando Gustilo.

Furthermore, as the Texas court of appeals emphasized in its opinion, Petitioners never contended in the Texas courts that the Philippine trial court lacked jurisdiction when it issued its 1985 order. Therefore, as the Texas court of appeals correctly held, Petitioners' attempt to collaterally attack that 1985 order must necessarily fail. "A collateral attack is an attempt to avoid the effect of a judgment in a proceeding brought for some other purpose." *Employers Casualty Co. v. Block*, 744 S.W.2d 940, 943 (Tex. 1988). The effect of that Philippine order was a finding by a court with jurisdiction that June Gustilo was

the biological child of Armando Gustilo. The instant lawsuit, which was initiated by the Petitioners, was a "proceeding brought for some other purpose." *Id.* at 943. Its purpose was to obtain a determination of all of the heirs of Armando Gustilo by a Texas court and to attempt to set aside the settlements made by the Petitioners in the Philippines. The Texas proceeding was not, however, an opportunity to relitigate the finding that Armando Gustilo was the father of June Gustilo.

For Petitioners to successfully collaterally attack the 1985 Philippine judgment, it was incumbent on them to show that the judgment was absolutely void, the court being without jurisdiction. *See Ex parte Tyler*, 261 S.W.2d 833 (Tex. 1953) (collateral attack must show judgment absolutely void, not merely voidable, rendered by a court without jurisdiction of the parties and of the subject matter). Even if the decision was erroneous, or rendered in disregard of procedural statutory requirements, it cannot be successfully attacked collaterally. *See Brazzel v. Murray*, 481 S.W.2d 801 (Tex. 1972).

Nowhere in the Texas courts did the Petitioners contend that the Philippine court did not have jurisdiction over the parties to that proceeding (Nadina Gustilo, Francisco Maravilla, and Armando Gustilo) when the 1985 order was signed, and nowhere did the Petitioners contend that the Philippine court lacked jurisdiction over the subject matter of the suit. Upon introduction of an authenticated copy of the 1985 order in the Texas case, June Gustilo made a prima facie case as to its validity, including jurisdiction, and the burden shifted to the Petitioners to prove a valid basis for collateral attack. *See Minuteman Press Int'l v. Sparks*, 782 S.W.2d 339 (Tex. App. – Fort Worth

1989, no writ). Petitioners not only failed this burden, but made no effort to carry it. Procedural attacks, which might render a judgment voidable but not void, are of no consequence. In effect, what Petitioners attempted to do was to bring an impermissible direct attack, relitigating the 1985 Philippine decision, in a collateral proceeding.

Petitioners' contention that *their* "due process" rights (See Petition, page 24) were somehow violated by the Texas courts' refusal to go behind the 1985 Philippine court order ignores the indisputable fact that the 1985 order was entered during the lifetime of Armando Gustilo, and that Armando Gustilo was not only a party to that proceeding, but was given notice of the proceeding, made an appearance therein, and concurred in the judgment. As heirs-at-law of Armando Gustilo, Petitioners are therefore bound by the effect of that judgment. It is well-settled in Texas that a judgment which affects an ancestor is conclusive on his heirs-at-law. *Berry v. Humble Oil & Refining Co.*, 205 S.W.2d 376 (Tex. Civ. App. – Waco 1947, writ ref'd n.r.e.); *Ray v. Chisum*, 260 S.W.2d 118, 124 (Tex. Civ. App. – Texarkana 1953, writ ref'd n.r.e.). Obviously, during Armando Gustilo's lifetime, the Petitioners (as children of Armando Gustilo) would have had no standing to complain when Armando Gustilo chose to acknowledge his paternity of another child.

There is no federal question with respect to this issue, and this Court has no jurisdiction to consider it.

B. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHEN TEXAS COURTS HAD VALID REASONS UNDER TEXAS LAW FOR DECLINING TO GIVE PRECLUSIVE EFFECT TO A JUDGMENT BY PHILIPPINE APPELLATE COURT.

Throughout their Petition, Petitioners urge that comity required the Texas courts to give preclusive effect to an opinion by a Philippine appellate court, styled Gustilo v. Agdamag, which decision was later affirmed by the Supreme Court of the Philippines. Petitioners argue that there is "supreme federal law" (Petition, page 18), which required the Texas courts to be bound by the Philippine appellate court decision, and that the Texas courts acted capriciously in declining to extend comity to the Philippine opinion.

The Texas court of appeals dealt extensively with the judgment of the Philippine appellate court. See Texas court of appeals Opinion, Appendix D, pages A-21 through A-24. In declining to give that opinion preclusive effect, the Texas courts were on sound legal ground.

First of all, the only issue addressed by the Philippine court of appeals in its opinion was the issue of the validity or invalidity of the compromise agreements signed by Petitioners in the Philippines. In the instant case, there were a great many other issues before the probate court. Among those issues was the question of whether the Petitioners were barred from recovery under the doctrines of waiver and release, and also under the doctrine of quasi-estoppel. In this regard, it should be emphasized that, in addition to signing the compromise agreements, Petitioners also signed additional documents entitled

"Waiver, Renunciation and/or Repudiation of Inheritance." The jury in the instant case found that the Petitioners had released *and* waived any further claims to the Gustilo estate, and the jury also found that Petitioners' own conduct precluded them from any further recovery in the estate under the doctrine of quasi-estoppel. Petitioners have never asserted that there was any error relating to these jury findings. Thus, even if the holding of the Philippine appellate court that the compromise agreements themselves were void was given effect by a Texas court, there was still ample basis to affirm the trial court's judgment on issues other than the validity or invalidity of the compromise agreements.

In addition, the opinion of the Texas court of appeals clearly demonstrates why comity should not be applied in this case. As the Texas court of appeals reasoned, Petitioners' attempt to give the Philippine appellate court opinion preclusive effect in Texas was nothing more than "an attempt to have two bites at the same apple." (Texas court of appeals Opinion, Appendix D, page A-23 at footnote 6). In rejecting Petitioners' arguments, the Texas court of appeals pointed out:

> "Initially, appellants [Petitioners] lost their argument concerning the compromise agreements in the Philippine court. While that case was under reconsideration in the Philippines, they filed suit in Houston essentially making the same claim: The compromise agreements were void because of the fraudulent actions of Nadina. When they learned their argument had been accepted by the Philippine appellate court, they attempted to use that decision in the Houston court. Now, unhappy with the outcome of their

> case in Houston, they want to rely on the Philippine court's decision. Appellants had the option of not filing suit in Houston, or filing for a stay under Section 36.007 of the Texas Civil Practice and Remedies Code. They chose neither avenue and cannot now complain because they did not prevail in Texas." (Texas court of appeals Opinion, Appendix D, page 23, footnote 6).

The above conduct by the Petitioners, as illustrated by the above language from the Texas court of appeals opinion, is a graphic example of why Texas courts have continued to uniformly hold that comity is not a matter of right but is voluntary and rests in the sound discretion of the tribunal of the forum. *See Nowell v. Nowell*, 408 S.W.2d 550, error dismissed, *cert. denied*, 88 S.Ct. 53, 389 U.S. 847, 19 L.Ed.2d 116; *Interfirst Bank – Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864 (Tex. App. – Houston [1st Dist.] 1985, error ref'd n.r.e.); *Gunter v. Glasgow*, 608 S.W.2d 273 (Tex. Civ. App. – Eastland 1980, no writ). In pointing out that Petitioners were seeking to have "two bites at the same apple", the Texas court of appeals was not only recognizing that comity is a matter for the sound discretion of a Texas trial judge, but following the principle, long established in Texas, that a party may, by his conduct, estop himself from invoking the benefits of the doctrine of res judicata (or, in the instant case, applying res judicata effect to a judgment of a foreign country, under the principle of comity). Among the Texas cases which hold that a party's actions and arguments during the course of litigation can cause him to be estopped from asserting res judicata are the following: *Sutherland v. Cobern*, 843 S.W.2d 127, 131 (Tex. App. – Texarkana 1992,

writ denied); and *Bethel v. Norman Furniture Co., Inc.*, 756 S.W.2d 6, 8 (Tex. App. – Houston [1st Dist.] 1988, no writ).

Once again, the Texas courts' rejections of Petitioners' contention on this issue were based on established Texas law, and no issue arising under the Federal Constitution is involved. Therefore, this Court is without jurisdiction to consider Petitioners' argument on this point.

C. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHERE A TEXAS APPELLATE COURT DECLINED TO ADDRESS THE ALLEGED MERITS OF AN ASSIGNMENT OF ERROR IN PETITIONERS' BRIEF TO THAT COURT ON THE GROUND THAT THE ASSIGNMENT OF ERROR WAS MULTIFARIOUS.

Petitioners next effort to invoke this Court's jurisdiction stems from a virtually unintelligible point of error which was contained in their brief to the Texas court of appeals. An excerpt from that point of error, entitled "Sixth Point of Error", is found in Appendix CC to Petitioners' brief, at pages A-115 through A-117.

As pointed out by the Texas court of appeals in its opinion, the "point of error" was in reality multiple subpoints, ranging from complaints about discovery and discovery sanctions to alleged errors in the jury charge. (Texas court of appeals Opinion, Appendix D, at A-26).

Faced with the content of the sixth point of error, which obviously attacked numerous unrelated rulings of the trial court in a "shot-gun" approach, the Texas court

of appeals followed well established Texas law in declaring the point of error to be multifarious and, therefore, disregarding it. The Texas court of appeals also stated: "This 'point of error' does not sufficiently direct the attention of the court to the error about which the complaint is made; nor are these numerous alleged errors supported by sufficient argument. *See Tex. R. App. P.* 74(d)." (Texas court of appeals Opinion, Appendix D, at A-27.)

Petitioners now contend that: (a) the Texas court of appeals violated Rule 90(a), Tex. R. App. P. in disregarding the sixth point of error; and (b) the alleged failure to follow Rule 90(a) somehow constitutes a violation of Petitioners' due process rights. (Petition, at page 24).

Any appellate court must have procedural rules to govern the form and clarity of briefs filed with that court. The Texas law on this subject is substantially the same as this Court has expressed in Rule 14.4:

> "The failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Sup. Ct. R. 14.4

In Texas, as in other jurisdictions, the policy behind such briefing rules is obvious. A good expression of the Texas policy is found in *Rio Delta Land Co. v. Johnson*, 566 S.W.2d 710, 713-714 (Tex. Civ. App. – Corpus Christi 1978, no writ):

> "This Court, in *Leal v. Aluminum Company of America*, 443 S.W.2d 942, 945-946 (Tex. Civ. App. – Corpus Christi 1969, no writ), speaking through Justice Nye, now Chief Justice, said:

> 'There must be a substantial compliance with the provisions of the briefing rules in order for a litigant to have his points of error considered by the appellate court. Although the rules are to be given a liberal construction to the end that a just, fair, equitable and impartial adjudication of the rights of the parties may be obtained, a sufficient compliance with the rules is necessary to justify consideration of the point of error. This has been made mandatory by our Supreme Court. *Wagner v. Foster*, 161 Tex. 333, 341 S.W.2d 887 (1960) . . . '

A point of error is multifarious if it embraces more than one specific ground of error, or if it attacks several distinct and separate rulings of the trial court [citations omitted].

It has long been the policy of this Court to indulge a liberal construction of the briefing rules in favor of the sufficiency of the brief, and to give effect thereto if we, from an examination of the statement under each point (or grouped points), can determine with some degree of certainty the nature of the complaint raised by the point. Here, there is no such statement. In order to properly dispose of the points as here presented, we would have to brief each of the challenged findings, many of which are completely independent of other findings which are complained of in the appeal. Without the benefit of a statement to assist us, the task would be enormous. No such liberality of construction is contemplated by the briefing rules.

In the instant case, the points are multifarious and will not be considered since each point attacks several separate and distinct findings of

> fact, and in some instances, separate and distinct conclusions of law."

Id. at 713-714.

A cursory examination of Petitioners' sixth point of error in the Texas court of appeals reveals that the multiple sub-points contained therein are precisely the kind of briefing abuse that the court rejected in *Rio Delta Land Co. v. Johnson, supra.* Petitioners failed to comply with standard briefing rules developed for the Texas appellate court system. Obviously, this Court need only compare its own rules with the briefing rules in Texas to conclude that no federal question is present with respect to this issue.

D. ANY FEDERAL QUESTIONS NOW RAISED BY PETITIONERS WERE NEITHER PRESERVED NOR DECIDED IN THE STATE COURTS AND, ACCORDINGLY, THIS COURT'S JURISDICTION MAY NOT NOW BE INVOKED.

Throughout their Brief, Petitioners allege that issues governed by the "supreme law of the land" were ignored by the Texas state courts during the trial and appeal process ultimately leading to the denial of their application for writ of error by the Supreme Court of Texas. The very basic problem with this argument is that Petitioners did not adequately raise and preserve, in the Texas courts, the alleged "federal questions" which they now seek to have this Court examine. Rule 14.1(g)(i) of the Rules of the Supreme Court of the United States clearly places the burden upon the Petitioners to specify in their statement of the case "the stage in the proceedings, both in the court of first instance and in the appellate courts,

when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts . . . " Sup. Ct. R. 14.1(g)(i).

The burden imposed upon the Petitioners under the above rule is a high one, and a party seeking to invoke this Court's jurisdiction must show that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation. This Court has stated numerous times that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969); and *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983).

The only statements in the Petition where Petitioners apparently seek to discharge the high burden referred to above are found at pages 10 through 16 of the Petition, where Petitioners state that "[f]oreign law was urged in numerous motions – all denied without resulting showing that any of such law was ever applied in this case . . . ". Petitioners then refer this Court to Appendices EE and FF which accompany their Petition. Appendix EE purports to show the "places where probate court was advised of foreign law" (Appendix, EE, page A-119), and Appendix FF purports to be an index of "foreign authority" filed in the Texas court of appeals.

The obvious flaw in Petitioners' references to "foreign law" as a means of invoking this Court's jurisdiction is that references to "foreign law" are not references to

federal constitutional issues. Even where the references to foreign law might be accompanied by vague references to due process violations, this Court's jurisdiction under 28 U.S.C. Section 1257(a) has not been properly invoked. In this regard, the instant case is similar to *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), where the size of a punitive damage award, sustained by the Mississippi Supreme Court, was at issue. In *Crenshaw*, this Court pointed out "that appellant's petition for rehearing alleged only that the punitive damages award 'was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles' . . . The vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claim." *Id.* at 77-78.

In the instant case, Petitioners did not properly raise any federal constitutional issues at any stage of the proceeding, until after the Supreme Court of Texas had denied the application for writ of error to that court.[1] The first time that Petitioners raised their constitutional argument under the supremacy clause of the U. S. Constitution was in their motion for rehearing to the Supreme Court of Texas. This Court has held that raising a federal question for the first time in a petition for rehearing

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[1] A vague reference to Petitioners' "due process" rights was raised in Petitioners' brief to the Texas court of appeals in their discussion of the proceedings leading to the 1985 Philippine trial court order. See page 7 of this Brief. Even this reference was not raised in the motion for rehearing to the Texas court of appeals. Therefore, under Texas procedural rules, the issue is deemed to have been waived and not properly preserved. Tex. R. App. P. 131(e).

addressed to the highest state court is insufficient unless that court actually entertains the petition and expressly decides the question. *Radio Station WOW v. Johnson*, 3826 U.S. 120, 128 (1945). In the instant case, the record reflects that the Supreme Court of Texas did not entertain or decide the alleged constitutional issues now urged by Petitioners. The Supreme Court of Texas simply denied the application for writ of error summarily, with the notation "writ denied." *See* Appendix C, page A-4, to Petition). Thus, under the rules of this Court and the established case law emanating from this Court, Petitioners' efforts to now invoke this Court's jurisdiction must fail, because the alleged federal questions now raised by Petitioners were neither preserved nor decided in the state courts.

E. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS CASE WHERE THE STATE COURT JUDGMENTS REST UPON INDEPENDENT STATE LAW GROUNDS.

Respondent Horrigan submits that his argument and authorities set forth above, coupled with the opinion of the Texas court of appeals, conclusively demonstrate that this controversy turns solely on questions of Texas law. While it is true that the effect (if any) to be given to an intermediate Philippine appellate court has been an issue in the case, the Texas courts were on sound procedural and substantive ground, under Texas law, in not permitting that opinion to control the outcome of the case, given the facts of this case and the conduct of the Petitioners themselves. It is also significant that the Texas court of appeals, in its opinion stated: "We have reviewed the law

from each jurisdiction potentially involved in this case and find our conclusion that the evidence was sufficient to support the jury's finding is correct under Texas, New Jersey, or Philippine law." (Appendix D, page A-15, footnote 4). Because the state grounds on which this case was decided are both independent and adequate to support the judgment, it is further submitted that this Court should not assume jurisdiction in this case. This Court so held in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

CONCLUSION

Respondent Horrigan respectfully submits that this Court has no jurisdiction in this matter because no substantial federal question is involved, and moves for dismissal on that basis. In the alternative, he requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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INDEX TO APPENDICES

APPENDIX I 1i

APPENDIX I

NO. 214,659

ESTATE OF	§	IN THE PROBATE COURT
ARMANDO C. GUSTILO,	§	NUMBER ONE (1) OF
DECEASED	§	HARRIS COUNTY, TEXAS

SECOND PARTIAL SUMMARY JUDGMENT IN HEIRSHIP PROCEEDING

BE IT REMEMBERED that on April 5, 1993, the Court heard the Second Motion for Partial Summary Judgment in Heirship Proceeding filed in this cause by June Salvacion Gustilo, a Minor, by and through her duly appointed attorney ad litem. The parties appeared by and through their respective counsel. The Court examined the pleadings, the Second Motion for Partial Summary Judgment, the responses thereto, and the summary judgment evidence, including the admissions, affidavits and authenticated or certified public records on file at the time of the hearing. Having examined such summary judgment evidence, and having heard the argument of counsel, the Court finds that the following uncontroverted facts exist:

1. That on January 1, 1985, the Honorable Rosario R. Veloso, Judge of the Regional Trial Court of the Republic of the Philippines, in Makati, Metro Manila, signed an Order in Cause No. Sp. Proc. No. M-130, styled "Nadina G. Maravilla, Petitioner v. Local Civil Registrar of Makati, Metro Manila, Respondent."

2. That a properly authenticated copy of said Order was attached to Movant's Second Motion for Partial Summary Judgment, through the Affidavit of Joseph S. Horrigan, attached to such Second Motion for Partial Summary Judgment.

3. That Armando C. Gustilo is the father of June Salvacion Gustilo.

4. That June Salvacion Gustilo is the daughter of Armando C. Gustilo, Deceased.

5. That any presumption that the biological father of June Salvacion Gustilo was Francisco J. Maravilla, Jr., was rebutted by the Order of the Philippine Court referred to above, dated January 7, 1985, which established the paternity of June Salvacion Gustilo by Armando C. Gustilo.

The Court is of the further opinion, and further finds that there is no genuine issue of material fact on the issue of whether June Salvacion Gustilo is a lawful heir of the Decedent, Armando C. Gustilo, and June Salvacion Gustilo, the moving party is entitled to judgment as a matter of law on such issue.

It is, therefore, ORDERED, ADJUDGED AND DECREED that at the trial of this cause, the findings of the Court, set forth above, are established as facts without the need of further formal proof.

It is further ORDERED, ADJUDGED AND DECREED that June Salvacion Gustilo, a Minor, be and she is hereby declared to be an heir of the Decedent, Armando C. Gustilo and, as a lawful heir, she is entitled to inherit from the Estate of Armando C. Gustilo, Deceased.

It is further ORDERED, ADJUDGED AND DECREED that the issue of the share and interest of June S. Gustilo in the real and personal property of such Decedent is hereby reserved for trial on the merits in this cause.

SIGNED this 8th day of June, 1993.

/s/ John Hutchison
JUDGE, PROBATE COURT NO. 1
OF HARRIS COUNTY, TEXAS

APPROVED AS TO FORM AND SUBSTANCE:

HORRIGAN & GOEHRS

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ATTORNEY AD LITEM FOR
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Supreme Court, U.S.
FILED
AUG 18 1997
CLERK

No. 97-136

In The

Supreme Court of the United States

October Term, 1996

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,

Petitioners,

vs.

NADINA (MARAVILLA) GUSTILO Individually, and as Former Administratrix of The Estate of ARMANDO C. GUSTILO, Deceased, and as Guardian of JUNE SALVACION (MARAVILLA) GUSTILO; JOSEPH S. HORRIGAN as Guardian Ad Litem and Attorney Ad Litem of JUNE SALVACION GUSTILO; and the Kanaly Trust Company as Administrator of the Estate of ARMANDO C. GUSTILO, Deceased,

Respondents.

**On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The Fourteenth Judicial District
Of Texas At Houston**

RESPONDENT'S BRIEF IN OPPOSITION

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10 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

MISSTATEMENTS BY PETITIONERS 1

RESPONDENT'S BRIEF IN OPPOSITION 1

RESPONDENT'S STATEMENT OF FACTS 1

JURISDICTION 5

REASONS FOR DENYING THE WRIT 6

1. THERE IS NO CONFLICT BETWEEN STATE COURT DECISIONS 6

2. NO FEDERAL QUESTION WAS PRESENTED BELOW IN THE PROBATE COURT, APPELLATE COURT OR ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT 7

3. THIS COURT HAS NO JURISDICTION BECAUSE THE STATE COURT'S JUDGMENT AND OPINION ARE BASED UPON AN INDEPENDENT AND ADEQUATE STATE GROUND 8

4. PETITIONERS RELIANCE ON THE SUPREMACY CLAUSE AND ON COMITY IS WAIVED BECAUSE THEY FAILED TO RAISE IT IN THEIR INITIAL APPEAL 8

5. THERE IS NO FEDERAL QUESTION PRESENTED OR PRESERVED ON RESPONDENT'S MARRIAGE TO GUSTILO 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 8

Bowe v. Scott, 233 U.S. 648 (1914) 7

City of Canton v. Harris, 489 U.S. 378 (1989) 8

Gunter v. Glasgow, 608 S.W.2d 273 (Tex. Civ App. – Eastland 1980, no writ) 9

Herndon v. Georgia, 295 U.S. 441 (1935) 7

Hill v. California, 401 U.S. 797 (1971) 7

Interfirst Bank – Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864 (Tex. App. – Houston [1st Dist] 1985, error ref'd n.r.e.) 9

LaSara Grain Co. v. First National Bank of Mercedes, 673 S.W.2d 558 (Tex. 1984) 9

McCauley v. Consolidated Underwriters, 304 S.W.2d 265 (Tex. 1957) 9

McGoldrick v. Compagnie Generale, 309 U.S. 430 (1940) 7

Norwell v. Norwell, 408 S.W.2d 550, error dism'd, cert. denied, 88 S.Ct. 53, 389 U.S. 847, 19 L. Ed. 2d 116 9

Oxley Stave Co. v. Butler County, 166 U.S. 648 (1987) 7

State Farm Mutual Automobile Insurance Association v. Cowley, 468 S.W.2d 353 (Tex. 1971) 9

Stine v. Koga, 790 S.W. 2d 412 (Tex. App. – Amarillo 1990, writ dism'd by agreement) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

U.S. CONST. art. IV, 1 ..... 5, 6

28 U.S.C., sec. 1257 5

RULES:

Sup. Ct. R. 14.1 (g)(i) 7

Tex. Civ. Prac. & Rem. Code Sec. 35.001 et seq 6

Tex. Civ. Prac. & Rem. Code Sec. 36.007 10

Tex. R. Civ. Proc. 166a(e) 4

MISSTATEMENTS BY PETITIONERS

Respondent adopts and incorporates herein the Misstatements pointed out in Respondent, Joseph S. Horrigan's, Attorney Ad Litem for June S. Gustilo, brief in opposition.

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now, Nadina Gustilo, individually and as former Administratrix of The Estate of Armando C. Gustilo, Respondent in this cause and respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Fourteenth Court of Appeals (Houston) Texas entered in this case on July 3, 1996. The opinion appears in petitioners' appendix D.

STATEMENT OF THE FACTS

Respondent adopts the factual and procedural history presented by the Fourteenth Court of Appeals (Houston) in its Opinion which is restated below for this Court's convenience.

On December 19, 1986, Armando C. Gustilo (Gustilo) died intestate in Houston, Texas. He left substantial assets in the United States and the Philippines. On June 2, 1987,

Nadina Gustilo (Nadina) filed an application for administration of the Estate in which she claimed to be Gustilo's surviving spouse. On June 17, 1987, the probate court appointed Nadina administratrix of the Estate, and she continued in that capacity until 1991 when she resigned and the Kanaly Trust Company was appointed successor administrator.

Meanwhile, in the Philippines, Gustilo's son Jose Vincente Gustilo, III (Jose), and Gustilo's daughter Mary Joy Anne Gustilo (Mary), moved for letters of administration and asked that Gustilo's brother be appointed administrator. In August of 1987, Mary, through her mother and guardian, Milagros Barco, entered into a "Compromise Agreement" with Nadina by which Mary waived and renounced her right to inherit from Gustilo. In return, Nadina gave Mary cash and property totaling $ 600,586.00. In February of 1988, Jose entered into a similar agreement with Nadina and received cash and property worth $717,703.00. These agreements were brought before a Philippine court for approval and were approved on March 1, 1988.

Several months after entering the agreements with Nadina, Jose and Mary filed motions asking the Philippine court to reconsider its order of March 1, 1988, approving the agreements. These motions alleged the compromise agreements were obtained through fraud and mistake due to alleged fraudulent concealment by Nadina. Jose and Mary claimed Nadina had misrepresented the size and value of the Estate in order to get them to settle for less than they were actually due.

In 1991, while the motions for reconsideration were pending, Jose and Mary filed suit in the Texas probate

court where the administration of the Estate was pending. In that suit they asked: (1) the court to declare Jose and Mary as Gustilo's children and sole heirs; (2) the court to declare that Nadina was not Gustilo's surviving spouse and that her daughter June Salvacion Gustilo (June) was not his child or heir; (3) the court to declare the compromise agreements void based on Nadina's fraudulent concealment; (4) for an accounting of the Estate monies because they suspected Nadina had taken and misused Estate Funds; (5) that Nadina be required to return Estate assets; and (6) for damages based on fraud, breach of fiduciary duty, trust conversion, and "intentional tort" committed by Nadina. Nadina, individually, as former administratrix, and as June's guardian, answered by general denial and affirmatively pled the defenses of compromise and settlement, release, waiver, estoppel, and quasi-estoppel.

While the case was pending in the probate court in Texas, the Philippine trial court denied the motions for reconsideration filed by Jose and Mary. This order was entered April 6, 1992. Jose and Mary appealed. The appellate court held the Philippine trial court committed a "grave abuse" of discretion when it denied the motions for reconsideration and found the March 1, 1988, and the April 6, 1992, orders were "null and void ab initio" and ordered them set aside. The Philippine trial court was ordered to: (1) continue with the proceedings for appointment of an administrator; (2) determine the relationship of Nadina and June to Gustilo; (3) resolve all other pending matters related to the Estate; and, (4) close the administration of the Estate by proper declaration of heirs and distribution.

Nadina filed a motion for reconsideration with the Philippine appellate court. Her motion was denied and she appealed the case to the Philippine supreme court. On January 24, 1994, the supreme court affirmed the decision of the appellate court.

TEXAS PROBATE COURT RULINGS AND JUDGMENT

Before trial, both sides filed partial motions for summary judgment concerning the heirship of Jose, Mary, and June. The trial court granted these motions and entered partial summary judgments declaring that Jose, Mary, and June are the children of Armando C. Gustilo and are, therefore, his heirs. Jose and Mary also filed a motion for partial summary judgment concerning Nadina's relationship to Gustilo. They asked the court to find as a matter of law that Nadina was not Gustilo's surviving spouse, or, alternatively, to make certain findings under Texas Rule of Civil Procedure 166a(e). There is no order in the record granting or denying this motion; however, the trial court did submit the question of whether Nadina was Gustilo's surviving spouse to the jury, therefore, he implicitly denied the motion.

After Jose and Mary rested their case-in-chief, the trial court granted June's motion for an instructed verdict on the cross-action for damages filed by Jose and Mary. The court submitted the remaining issues to the jury. The jury found: (1) Jose and Milagros Barco, as guardian and next friend of Mary, had released any and all claims to the estate; (2) neither Jose nor Milagros were fraudulently

induced to enter settlement agreements with Nadina concerning the estate; (3) Jose and Milagros waived, renounced, and repudiated any claim to the estate; (4) neither Jose nor Milagros were fraudulently induced to waive any claim to the estate; (5) the Compromise Agreements entered into by Jose and Milagros were "fair" contracts; (6) neither Jose nor Milagros were fraudulently induced to enter the Compromise Agreements; (7) both Jose and Milagros were prevented from claiming any further benefits from the Estate based on the doctrine of "quasi-estoppel"; and (8) that Nadina is the surviving spouse of Armando C. Gustilo.

Based on the jury's answers, the partial summary judgments, and the instructed verdict, the probate court entered judgment that: (1) Jose, Mary, and June are the children and heirs of Armando C. Gustilo; (2) Nadina is the surviving spouse of Armando C. Gustilo and entitled to a spouse' share of the estate; and (3) Jose and Mary are not entitled to any further share or interest in the Estate and should take nothing on their claims for damages. Jose and Mary filed the appeal.

JURISDICTION

This Court lacks jurisdiction because: (1) their is no conflict between state court decisions, U.S. CONST. art. IV, 1; (2) petitioner failed to properly raise a substantial federal question in the state court proceedings, 28 U.S.C., sec. 1257; (3) the judgment and opinion is based upon independent and adequate state grounds; and, (4) petitioners waived their right to rely on the Supremacy

Clause and on comity because they failed to raise it in their initial appeal. (Petitioners' Appendix D, pgs. A9-30).

REASONS FOR DENYING THE WRIT

1. THERE IS NO CONFLICT BETWEEN STATE COURT DECISIONS.

Petitioners allege that there is a conflict between the Texas state court decision in *Gustilo v. Gustilo* (Petitioners' Appendix D) and the Philippines Court of Appeals decision in *Gustilo v. Agdamag* (Petitioners' Appendix I).

Petitioners filed a motion with the Texas court of appeals asking it to give full recognition of the Supreme Court of the Philippines decisions under section 35 of the Texas Civil Practice and Remedies Code, and upon doing so, to enforce those decisions by setting aside all the jury findings relating to the agreements between Nadina and appellants. (Petitioners' Appendix D, pg. A-24, ftn. 7). As the court stated, "section 35 is based on the full faith and credit clause of the U. S. Constitution. See *Stine v. Koga*, 790 S.W.2d 412, 414 (Tex. App. – Amarillo 1990, writ dism'd by agreement)" *Id*. The **full faith and credit clause of the U.S. Constitution states that full faith and credit shall be given in each state to the judicial proceedings of every other state.** (emphasis added). U.S. CONST. art. IV, 1. Thus, both section 35.001 et seq. of the Texas Civil Practice and Remedies Code and the U.S. CONST. art. IV, 1 apply to court decisions from other states, not other countries. (Petitioners' Appendix D, pg. A-24, ftn. 7).

Accordingly, petitioners are mistaken that a conflict of law exists.

2. NO FEDERAL QUESTION WAS PRESENTED BELOW IN THE PROBATE COURT, APPELLATE COURT OR ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT.

A federal claim cannot be considered by this Court unless it has been either raised in the state court or considered and resolved by the state court. See *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940): *Hill v. California*, 401 U.S. 797, 805 (1971). Furthermore, Rule 14.1 (g) (i) states that the petitioner seeking review of a state court decision in meeting this burden, must specify in the statement of the case " . . . the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised: the method or manner of raising them and the way in which they were passed upon by those courts. . . . " Sup. Ct. R. 14.1(g)(i). This Court has held in the past that a mere reference to the "Constitution of the U.S." (*Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935)), or the "Constitution and laws of the U.S." (*Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1987)), or "due process of law" (*Bowe v. Scott*, 233 U.S. 648, 664-65 (1914)), is insuffient to raise a federal question.

No federal question was timely preserved in the courts below nor resolved by the Texas courts, and thus should not be considered by this court. Petitioners' writ should be denied.

3. THIS COURT HAS NO JURISDICTION BECAUSE THE STATE COURT'S JUDGMENT AND OPINION ARE BASED UPON AN INDEPENDENT AND ADEQUATE STATE GROUND.

This Court's jurisdiction fails because the state court's judgment and opinion are based upon an independent and adequate state ground. *Black v. Cutter Laboratories,* 351 U.S. 292, 298 (1956). The Texas court of appeals held that there was both legally and factually sufficient evidence for the jury to have found that Nadina was Gustilo's surviving spouse. (Petitioners' Appendix D, pg. A-15). In footnote 4, of the opinion the court stated "[w]e have reviewed the law from each jurisdiction potentially involved in this case and find our conclusion that the evidence was sufficient to support the jury's finding is correct under Texas, New Jersey, or Philippine law." (Petitioners' Appendix D, pg. A-15, ftn. 4).

4. PETITIONERS RELIANCE ON THE SUPREMACY CLAUSE AND ON COMITY IS WAIVED BECAUSE THEY FAILED TO RAISE IT IN THEIR INITIAL APPEAL.

The basic requirement for obtaining certiorari is preserving issues below. Although this Court is not jurisdictionally barred from considering issues that have not been properly preserved, it ***will consider such arguments only in exceptional cases***. *See, e.g., City of Canton v. Harris,* 489 U.S. 378, 384 (1989) (emphasis added). Petitioners have failed to establish that this is an exceptional case on this issue.

Additionally, petitioners ignored the long standing rule that any point of error not included in an application for writ of error filed in the Supreme Court of Texas is, likewise, waived. *See, e.g., McCauley v. Consolidated Underwriters*, 304 S.W.2d 265 (Tex. 1957); *State Farm Mutual Automobile Insurance Association v. Cowley*, 468 S.W.2d 353 (Tex. 1971).

Petitioners have clearly waived the right to raise comity as an issue before this Court. There was absolutely no mention of the doctrine of comity in petitioners' initial appeal to the Texas court of appeals. Points of error not separately briefed are waived. *LaSara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558, 568 (Tex. 1984).

The Texas courts have continued to uniformly hold that comity is not a matter of right but is voluntary and vests in the sound discretion of the tribunal of the forum. *Norwell v. Norwell*, 408 S.W.2d 550, error dism'd, cert. denied, 88 S.Ct. 53, 389 U.S. 847, 19 L. Ed. 2d 116; *Interfirst Bank – Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864 (Tex. App. – Houston [1st Dist] 1985, error ref'd n.r.e.); *Gunter v. Glasgow*, 608 S.W.2d 273 (Tex. Civ App. – Eastland 1980, no writ). Petitioners did not preseve the issue of comity nor did they preseve that any court below abused their discretion. In fact, they have never raised any claim of abuse of discretion.

Furthermore, the Texas court of appeals demonstrated why comity should not apply in this case. The court "in dicta" stated as follows:

> "Initially, appellants [petitioners] lost their argument concerning the compromise agreements in the Philippine court. While that case

> was under reconsideration in the Phillippines, they filed suit in Houston essentially making the same claim: The compromise agreements were void because of the fraudulent actions of Nadina. When they learned their argument had been accepted by the Philippine appellate court, they attempted to use that decision as a bar in the Houston court. Now, unhappy with the outcome of their case in Houston, they want to rely on the Philippine court's decision. Appellants had the option of not filing suit in Houston, or filing for stay under section 36.007 of the Texas Civil Practice and Remedies Code. They chose neither avenue and cannot now complain because they did not prevail in Texas." (Petitioners' Appendix D, pg. A-23, ftn. 6).

5. THERE IS NO FEDERAL QUESTION PRESENTED OR PRESERVED ON RESPONDENT'S MARRIAGE TO GUSTILO.

Petitioners allege in their petition before this Court that federal questions and concerns of the sovereign laws and policies of the United States and customary laws of the nations were breached by the courts failure to correctly apply Philippine law.

The Texas court of appeals clearly and succinctly reviewed the evidence concerning the issue of whether Respondent, Nadina Gustilo, was Armando Gustilo's surviving spouse. The court found there was evidence both legally and factually sufficient for the jury to find that Nadina was Gustilo's surviving spouse.

Petitioners alleged to the Texas court of appeals that the statements made by or atttributed to Nadina were

judicial admisssions. Petitioners introduced two exhibits: "(1) a petition filed by Nadina in the Philippines to correct June's birth certificate; and (2) facts stated by the Philippine court in its decision declaring the compromise agreement null and void", to show Nadina's first marriage to Maravilla was still valid at the time she married Gustilo. Petitioners argued that these documents were judical admissions. (Petitioners' Appendix D, pg. A-13).

The court throughly analyzed each piece of evidence, and correctly established why they were not judidical admissions. (Petitioners' Appendix D, pgs. A-14,15). The court reasoned that the New Jersey marriage license, which admitted she had been married to Maravilla, but also indicated that it had been "annulled" along with other evidence presented established "a prima facie case of Nadina's marriage to Gustilo and some evidence that Nadina's first marriage was annulled before she married Gustilo in 1982." (Petitioners' Appendix D, pgs. A-12,13). The court further pointed out that some of the documents which petitioners contend contained the alleged judicial admissions "were not introduced into evidence, despite repeated invitations from the trial court." (Petitioners' Appendix D, pg. 10). Furthermore, the court stated "[a]ppellants provide argument on conflict of law and the appropriate law to be applied in determining whether Nadina was Gustilo's surviving spouse. We have reviewed the law from each jurisdiction potentially involved in this case and find our conclusion that the evidence was sufficient to support the jury's finding is correct under Texas, New Jersey, or Philippine law." (Petitioners' Appendix D, pg. A-15, ftn. 4). Accordingly, petitioners are mistaken that all aspects of the laws of Texas,

New Jersey and Philippine law were not considered. (Petitioners' Appendix D, pg. A-15, ftn. 4).

No federal question exists or was preseved on the grounds of the Supremacy Clause or comity. Accordingly, petitioners writ should in all respects be denied.

CONCLUSION

Respondent Nadina Gustilo respectfully submits that this Court has no jursidiction in this matter because their is no conflict of laws and no substanitial federal question is involved. Respondent moves for a dismissal on this basis, or in the alternative requests this Court to deny petitioners writ for certiorari.

Respectfully Submitted,

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Supreme Court, U.S.
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No. 97-136

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,
PETITIONERS

v.

NADINA (MARAVILLA) GUSTILO, Individually
and as Former Administratrix of
The Estate of Armando C. Gustilo, Deceased,
and as Guardian of June Salvacion (Maravilla)
Gustilo; JOSEPH S. HORRIGAN, as Guardian Ad Litem
and Attorney Ad Litem of June Salvacion Gustilo;
and the KANALY TRUST COMPANY, as Administrator
of the Estate of Armando C. Gustilo, Deceased,
RESPONDENTS

On Petition for Writ of Certiorari to the
Fourteenth Court of Appeals for the State of Texas

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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REPLY QUESTIONS FOR REVIEW

Whether, in suit involving only non-resident aliens, ultimate issues concerning foreign inheritance and foreign civil status present considerations of comity and conflicts of law which must be decided in conformity with United States foreign policies, international law, treaties and compacts as supreme **federal law**.

Whether parochial laws of individual states or judicial acts of state judges may override supreme **federal law** and comity principles to provide "adequate state ground" for denial of rights of alien litigants established under laws of their domiciles.

Whether violation of federal international obligations **or federal law** occurs when a domestic appellate court, upon no disclosed base greater than caprice, refuses to give credit and effect to controlling foreign statutes or discuss and distinguish squarely conflicting decisions of superior foreign courts in claims of alien litigant when doctrines of comity and *stare decisis* require a different outcome, and domestic law requires a full discussion of all material issues raised on appeal.

Whether **"denial of justice", as understood under international law**, or denial of due process under the Fourteenth Amendment, occurs when state appellate court, in respect to questions duly put before it, in appeal by alien litigants of decision in conflict with state and federal law, **refuses to consider, discuss or determine issues of controlling foreign law** or refuses to consider and distinguish directly-conflicting decisions of Texas Supreme Court or refuses to review cumulative prejudicial effect of trial court errors fairly raised below and argued on appeal.

Whether United States Supreme Court has jurisdiction and commitment under international law to issue writ of certiorari to correct highest state court in decision resulting in or which may result in denial of justice to citizen of cooperating nation.

LIST OF PARTIES

The parties to the proceeding below set forth in the caption are as follows:

1. Mary Joy Ann Gustilo

2. Jose Vicente Gustilo, III

3. Nadina Maravilla Gustilo

4. Joseph A. Horrigan

5. June Salvacion Gustilo

6. Kanaly Trust Company

TABLE OF CONTENTS

Page

REPLY QUESTIONS FOR REVIEW ii

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

I. MISSTATEMENTS OF RESPONDENTS STATED OR ADOPTED 1

II. STATEMENT OF CASE 5

III. FEDERAL QUESTIONS 5

A. The Agreements 5
B. Spousal Status, Nadina 6
C. Filiation of June Salvacion 7

IV. CRITICAL ISSUES NOT CONTESTED BY RESPONSES 8

V. JURISDICTION 9

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Federal Cases **Page**

Bank of Augusta v. Earle (13 Peters 519; 10 L.Ed. 274 [Sup. Ct. 1859]) 8

Martin v. Hunters Lessee, 14 U.S. 304 (1816) 9

NAACP v. Alabama, (1964) 377 US 288, 12 L.Ed.2d 325, 84 S.Ct. 1302 9

Texas Cases

Cameron County v. Velasquez, 668 S.W.2d 776 (Tex. App.--Corpus Christi 1984, writ ref'd, n.r.e.) 7

Huckin v. Connor, 928 S.W.2d 180 (Tex.App.--Houston [14th Dist.] 1996, reh'g overruled) 7

Long v. Knox, 291 S.W.2d 292 (Tex.1956) 7

Mendosa v. Fidelity & Guar. Ins. Underwriters, Inc., 606 S.W.2d 692 (Tex.1980) 7

Moore v. Neff, 629 S.W.2d 827 (Tex.App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.) 7

Welder v. Welder, 794 S.W.2d 420 (Tex.App.--Corpus Christi 1990 7

Philippine Cases

Arsenol v. Intermediate Appellate Court, 1986 Phil. Sup. Ct., Lexus 2709 (7-14-86) 6

Republic v. Marcos, 182 SCRA 223 . . . . . 3, 4

Republic v. Bartolome, Vol. 138 SCRA 442 (1985) 4, 8

Ty Kong v. Republic of the Philippines, 94 Phil. Reports 321 (1954) 4, 8

V.D.A. DeCastro v. Republic, Vol. 134 SCRA 14 (1985) 4, 8

Philippine Cases Involving the Parties to this Appeal

Gustilo, et al. v. Court of Appeals, et al., G.R. No. 111237, Republic of the Philippines, Supreme Court, Manila, Third Division 6

Maravilla v. Local Civil Registrar, SP. No. M-130, Regional Trial Court, Republic of the Philippines, Branch CXXXIII (133), Makati, Metro Manila 1

United States Constitution

Fourteenth Amendment, U.S. Constitution . . . . . ii, 7, 10

Article VI, Section 2, U.S. Constitution 7, 9, 10

Article III, Section 2, U.S. Constitution 9

Texas Statutes

Section 13.21, Texas Family Code, V.T.C.A. 3

Section 13.22, Texas Family Code, V.T.C.A. 3

Section 160.202, Texas Family Code., V.T.C.A. 3

Philippine Statutes

Article 170, Philippine Family Code (The Family Code of the Philippines Explained, Vol. 2, Lizaso, 1990, p.53) 3, 7

Article 263, Civil Code of the Philippines Annotated, Paras, Ninth Ed., 1978 7

Article 1409, Civil Code of the Philippines Annotated, Paras, Ninth Ed., 1978 6

Secondary Sources

Restatement (Third) Foreign Relations Law of the United States § 13 9

Philippine Secondary Sources

The Family Code of the Philippines Explained, Vol. 2, Lizaso, 1990 . . . . . 3, 7

I. MISSTATEMENTS OF RESPONDENTS STATED OR ADOPTED

[Nadina (Maravilla) Gustilo's Response may be referred to as "Nadina Response" or "Nad. Resp.", and Response of June Salvacion (Maravilla) Gustilo may be referred to as "Horrigan Response" or "Horr. Resp.". Appellants' Brief and Appellants' Reply Brief in the Court of Appeals may be referred to as "App. Br." and "App. Rep. Br."]

1. Appendix I, Horrigan Response, **was not in Respondents' briefs nor in record on appeal** nor in files of Petitioners nor approved by Petitioners. **Respondent Horrigan is in error in disparaging Petitioners' references to partial summary judgment of June 1, 1992 as "misstatement".** Court below refused to set aside partial summary judgment, though urged to do so by Petitioners on ground that, if not set aside, no basis could exist for further summary judgment (Tr.2315-2322).

2. Respondent Horrigan incorrectly states that 1985 Philippine court order ("Veloso decision") to correct the child's [June Salvacion Maravilla's] birth certificate "was not appealed ... [and] ... was, therefore, a *final* judgment under any definition" (Horr.Resp.p.4). The 1985 order has been in Philippine appellate courts throughout most of these proceedings (App.Br. p.30 and Tr.2324, Append. 1 herein, p.A-1). While in the Philippine Supreme Court, the appeal has been the subject of Petitioners' request for delay filed in Texas Supreme Court to permit decision by Philippine Supreme Court (Motion for Extension of Time, filed 9-10-96,pp.4-5). The appeal continues.

3. Respondent Horrigan incorrectly states that Petitioners' claim that 1985 order in *Nadina G. Maravilla v. Local Civil Registrar* was rendered *ex parte* is "factually inaccurate" (Horr. Resp.p.5). Judge Veloso expressly found: "On motion of counsel for the petitioner [Nadina Maravilla], he was allowed to present evidence ex-parte" (see Tr.1116, Order dated 1-7-85, Append.2 herein, p.A-2), as stated by Petitioners, viz: Decision was made "in an ex parte proceeding seven years after her birth" (Petition for Writ of Certiorari, p.14 [hereafter "Pet. for Cert."]). The record shows failure of *personal* service upon

Maravilla and Gustilo and no actual appearance of either *after* being joined as a party (see Plaintiffs' trial exhibit P73, 31st page [Sheriff's Return re: Maravilla], also at Tr.2123, Append.3 herein, p.A-3; Exh.P73, 23rd page [Officers Return re: Gustilo and Maravilla], also at Tr.2103, Append.3 herein,p.A-4,5). If served, each defaulted making a response. No adverse person was personally noticed or present in court to summon and examine Maravilla or to show the total and obvious discrepancy between Maravilla's signature upon his marriage license before 10 witnesses (Exh.P73, 17th pg.; also at Tr.2297), and his purported, unattested signature of conformity upon Nadina's first, but superseded, pleading (Exh.P73, 7th pg.; also at Tr.2302), filed 3-17-83, wherein **she swore she was married to Maravilla seven months after her bigamous marriage to Gustilo** (repeated in amended pleading). There is no **proof** of any kind that Gustilo filed a "Constancia" or was aware of the proceedings.[1] The child had no representative present. The matter was decided *ex parte* in the purest sense.

4. Respondent Horrigan flatly states that Petitioners "never contended in the Texas courts that the Philippine trial court lacked jurisdiction when it issued its 1985 order" (Horr.Resp. p.5). Curiously, Horrigan never asserted the order had binding effects[2]. However, his statement is palpably **false**. Petitioners repeatedly asserted that Philippine court lacked jurisdiction (App. Br.pp.25,26; App.Rep.Br.pp.28, 29; and App. Mot. for Rehearing, Court of Appeals:pp.19-22, 24, 27 para.5 [see Append.4 herein, p.A-6], 29 para.4, 30 and 33 [see Append.4, p.A-6];

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[1] Do Respondents claim Gustilo was notified and agreed with Nadina's sworn petition stating that she was still married to Maravilla?

[2] Contrary to Horrigan's assertion (Horr.Resp.p.5 lines 18-19), June Salvacion never mentioned the 1985 order in her initial or amended pleadings below (App.Rep.Br.p.39) nor asserted it as an affirmative defense or as "res judicata". She is now barred from doing so. The order was mentioned **as a source of evidence** or element of attempted proof in her summary judgment motions, **but never in supporting pleadings**.

also Mot. for Rehearing En Banc pp.20,23). June Salvacion and Maravilla are shown to be indispensable as **moving parties** (see para.5, *infra*). Petitioners summarized: Recognition of "... claimed rights of June Salvacion **not having been established by a court invested with jurisdiction and authority** sufficient for such purpose under controlling Philippine law, constituted a denial of due process and also simple, reversible error" (App. Mot. for Rehearing, Court of Appeals, p.33).

5. Respondent Horrigan further states: "Nowhere in the Texas courts did the Petitioners contend that the Philippine court had no jurisdiction over" Nadina, her husband Maravilla, and proposed father, Gustilo, or lacked subject matter jurisdiction (Horr.Resp.p.6). However, Petitioners pointed out that affected person, June Salvacion, was indispensable party. (*Republic v. Marcos*, 182 SCRA 223 (1990), Append.5 herein, p.A-7)[3]. Only Maravilla could bring an action questioning legitimacy of June Salvacion (App.Br.p.25, Append.6 herein, p.A-10)[4]. Petitioner argued strenuously below (*id.*) that Maravilla did not bring suit or become plaintiff as indispensable element of jurisdiction. Nadina was not permitted under Philippine law to bring either a change of name or impugnation suit (*id.*), especially without presence of her daughter as a party.

Unverified "Constancia", filed by an undisclosed person, unproved as summary judgment evidence, gave Gustilo no connection with case. It was never shown to have competency under §§ 13.21 and 13.22 (now § 160.202) Texas Family Code, V.T.C.A. (App.Br.pp.29-30) or under Philippine law[5] (App.Rep.Br.p.5, esp.FN8; Append.7 herein, p.A-12).

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[3] This case was not cited below, but June Salvacion was stated to be an indispensable party.

[4] Esp. see commentator's notes re: Article 170, Philippine Family Code (The Family Code of the Philippines Explained, Vol. 2, Lizaso, 1990, p.53) (Appendix L, Pet. for Cert., p.A-53).

[5] The Family Code of the Philippines Explained, *supra*, at p.57; also Act No. 3753 Sec. 5, 9).

Three cases decided by the Philippine Supreme Court were cited numerous times below, in all courts, for express purpose of showing that Philippine court lacked subject matter jurisdiction [See *Ty Kong v. Republic of the Philippines*, 94 Philippine Reports 321 (1954); *Republic v. Bartolome*, Vol. 138 SCRA 442 (1985); and *V.D.A. DeCastro v. Republic*, Vol. 134 SCRA 14 (1985). These cases are attached to Pet. for Cert. as Appendices N (p.A-55), O (p.A-58), and P (p.A-63). **The action as brought did not give court power to determine filiation or heirship** (see *Republic v. Marcos*, Append.5 herein, p.A-7).

6. Horrigan falsely states that no objection was made to jury issues and findings (Horr.Resp.p.9). Plaintiffs' Amended Motion for Judgment concerns itself *in extenso* on such matter (Tr.2287-2290, Append.8 herein, p.A-13), as does Petitioners' exceptions to charge and Motion for New Trial. Each recites related trial objections and motions and points out that **issues were barred by Philippine law and court decision**. See App. Br. below: Fourth Point and Sixth Point (esp. subpoints k, l, m and n).

7. Nadina states that trial court did not deny Petitioners' requested finding that Nadina obtained annulment of Maravilla marriage on 3-12-85 (see S.F.389-395, Append.9 herein, p.A-16 - A-17), and Court of Appeals found that Petitioners did not attack Nadina's prima facie case. This simply ignores the record showing **Nadina's incompetence to marry, as a matter of law** (see Append.10 herein: Tr.2262-2270 [at p.A-18], App.Br., First Point: b, c, d, e, f [p.A-22], and excerpt from Amended Motion for Rehearing filed in Texas Supreme Court [p.A-24]; also see Petitioners' requested instructions below).[6]

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[6] Motion for special instruction denied S.F.1526; motion for instructed verdict (S.F.1545-1550, denied S.F.1557); Motion in Limine (Tr.2012); motion for instructed finding of 12-24-70 Maravilla marriage and annulment 3-12-85 (S.F.395 [Append.9 herein p.A-16]); objection to issue on marriage (S.F. 1704 [Append.11 herein, p.A-26] and S.F.1632 [Append.11 herein, p.A-26]); First Amended Mot. for Judgment (Tr.2262); Mot. for New Trial (Tr.2476).

II. STATEMENT OF CASE

> "But, at virtually every stage ... Petitioners have been seriously affected ... by parting blows from Respondents containing representations which, Petitioners believe, a candid court should consider to have been either directly false or to have been utilized and packaged in such a way as to drive home a false message".

The quotation is from page 7 of Petitioner's Surrejoinder, filed in Texas Supreme Court on 3-26-97. Attempted correction of misstatements consumed important briefing space in all courts below and here. Respondents' false representations have resulted in a virtually impenetrable circle, whereby appellate court adopts Respondents' false representations without correction. The opinion is then cited as authority for originally-false representations. Requested rehearing for clarification of an obviously factually incorrect opinion is refused. Petitioners find their appeal totally distorted. They appeal to the record to support this petition and the below arguments and corrections.

III. FEDERAL QUESTIONS

A. The Agreements

On February 5, 1978, long prior to Nadina's probate proceeding in Texas (not "meanwhile", as urged Nadina Resp. p.2), Mary Joy, acting through her guardian, initiated probate proceedings in the Philippines (Appendix I to Pet. for Cert. at p.A45). The term "meanwhile" utilized by Court of Appeals at beginning of third paragraph of opinion is misconception.

Append.12 herein (p.A-27), a statutory application for Declaration of Heirship filed by Dr. Gerardo Gustilo on 4-12-91 naming these Petitioners as heirs, **initiated this lawsuit**. Both Respondents, without references to record, have driven courts in this appeal to believe Petitioners filed this suit as "plaintiffs" in 1991 seeking to set aside settlement agreements and affirmative relief (see Opinion attached to Pet. for Cert. at pp.A-6, A-7, and A-23, esp.FN6). **The record reflects instead that Petitioners initiated their probate action in the Philippines** and faithfully and successfully pursued Philippine remedies and that **Nadina**

placed the Philippine agreements in issue for the first time in Texas on 1-23-92 (Tr.207), and ninety days later Petitioners filed Second Amended Response and Joinder (Tr.662-688). Petitioners asserted primacy of Philippine law in Texas suit and insisted upon comity (Appendix X to Pet. for Cert., p.A-91). Trial court simply concluded: "I will deny comity to the Philippine decisions" (*id.* p.A-92)--**a denial of federally-protected right**.

On May 10, 1994, Respondents jointly (and falsely[7]) informed the Fourteenth Court of Appeals, viz:

> "The decision of the Philippine courts are not final and conclusive and are in fact being appealed on the grounds of severability of the agreements and the waiver, renunciation, repudiation and assignment of interest clauses of the agreements." (Joint Motion to Strike Appellants' Notice of Foreign Judgments, p.8).

But all claims and equities of Respondents had been finally and emphatically denied "for lack of merit" by Philippine Supreme Court (see FN7). **Under federal policies of comity, further claims of Respondents were barred** under authority of *Arsenol v. Intermediate Appellate Court*, 1986 Phil. Sup. Ct., Lexus 2709 (7-14-86) (Appendix F to Pet.for Cert., p.A-33; see also Pet.forCert. pp.9, 10) and Article 1409, Civ. Cd. of Phil. Ann., Paras, Ninth Ed., 1978 (Appendix Y to Pet. for Cert, p.A-93). Yet these prohibited claims, now reasserted for the fifth time by Horrigan (Horr.Resp.pp.8, 9), were retried in probate court over objection (Appendix X to Pet. for Cert., pp.A-91-93).

B. Spousal Status, Nadina

Collateral effects given by Opinion below to appealed, *ex parte*, 1985 Veloso decision purportedly declaring June Salvacion's illegitimacy, are in sharp and constitutionally

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[7] Respondents' representations were false. The Philippine court ruled against these claims finally on 3-23-94, some 40 days previously, and had emphasized in bold type that its decision was "***FINAL***" [court's emphasis] and was "for lack of merit" [our emphasis]. See Append.13 herein, p.A-33.

impermissible contrast to that same court's denial of preclusive effects to 7th Court of Appeals' decision, confirmed by Philippine Supreme Court after adversarial trial participated in by all parties. But these effects given Veloso decision as favoring June Salvacion's claimed filiation are in even less explainable contrast to Texas court's rejection of finding in same decision that Nadina was married to Francisco Maravilla, supported by her oath to this fact before Judge Veloso (see Append.10 herein, p.A-21 and see page 4, paragraph 7, *supra*). A finding of marriage to Maravilla was mandated under Texas law[8]. Selective resort to Veloso findings, rejection of 7th Court of Appeals findings, and refusal to find that Nadina was bound by her testimonial declarations here and in the Philippines (Appendix Z to Pet. for Cert. at p.A-94 - A-99) **violated federal principles of comity, Law of Nations, and supreme federal and constitutional law (Fourteenth Amendment and Article VI, Section 2)**. Nadina was shown to be incompetent to marry Gustilo and could not make a prima facie case under Philippine or Texas law.

C. **Filiation of June Salvacion**

Presumed filiation of June Salvacion was fixed under Article 263, Philippine Civil Code and Article 170, Philippine Family Code[9] (see Pet. for Cert., Appendices K [p.A-52] and L [p.A-53]). Lizaso states (referring to statutory one-year period provided for bringing action to contest presumed filiation), viz:

> "Once these periods expire, no action may be entertained anymore by the Court. **Thereby, the status of the child as presumed by law shall become fixed.**

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[8] *Long v. Knox*, 291 S.W.2d 292 (Tex.1956); *Moore v. Neff*, 629 S.W.2d 827 (Tex.App.–Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Cameron County v. Velasquez*, 668 S.W.2d 776 (Tex.App.–Corpus Christi 1984, writ ref'd, n.r.e.); *Huckin v. Connor*, 928 S.W.2d 180 (Tex.App.–Houston [14th Dist.] 1996, reh'd overruled); *Welder v. Welder*, 794 S.W.2d 420, 431 (Tex.App.–Corpus Christi 1990; *Mendosa v. Fidelity & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692 at p.694 (Tex.1980).

[9] Civil Code of the Philippines Annotated, Paras, Ninth Edition, 1978; The Family Code of the Philippines Explained, Lizaso, Vol.2, 1990 Ed. (textual matter and illustrative cases).

> **The status then can no longer be questioned in any other case, or in any other forum. ... [S]aid issue may no longer be inquired into, even by way of defense or in a collateral issue in another action for a different purpose"** (*The Family Code of the Philippines Explained*, Lizaso, Vol. Two p.54).

A fortiori, an action brought by mother (who is not permitted to bring action questioning legitimacy of her child) to correct the public register (begun seven years after birth registration, in which action neither presumed father nor proposed father are shown--even imperfectly--to have appeared after having been joined, and minor child was unrepresented) must certainly be ineffective upon its face to alter filiation, a result not even petitioned for (see *Republic v. Bartolome, id.*; *V.D.A. DeCastro v. Republic, id.*; and *Ty Kong v. Republic of the Philippines, id.*). To deny applicability of Philippine law in the analysis of Veloso decision and June Salvacion's claims is **to deny basic rudiments of comity rights** of Petitioners which Chief Justice Taney states is a concern of this court and **an incident of federal law** in *Bank of Augusta v. Earle* at p. 536 (13 Peters 519, 536; 10 L.Ed. 274, 288 [Sup. Ct. 1859]).

IV. CRITICAL ISSUES NOT CONTESTED BY RESPONSES

Neither Horrigan nor Nadina deny that settlement agreements are determined to be void under Philippine law or that Philippine law applies to Philippine agreements; neither deny that Petitioners are aliens and Philippine citizens. Neither has offered evidence that Nadina had sexual contact with Gustilo during any relevant time, or **conclusive** evidence--or even substantial evidence--that sexual contact with Maravilla was impossible.[10]

No party to this appeal has ever denied that Nadina's marriage to Maravilla was annulled by her on March 12, 1985, and the trial court acknowledged this, and Nadina swore to it.

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[10] Nadina's affidavit and testimony affirmatively reflect the possibility of sexual contact. She was "with my husband" (S.F. Pretrial hearing on motions on 6-17-91, pp.108-109; also Tr.1395-1396).

Neither Horrigan nor Nadina has responded effectively to Petitioner's Point C insofar as it relates to duty of the Court of Appeals to apply and discuss foreign law in determination of matters of Philippine succession and status such as filiation, impugnation (of legitimacy) and foreign marriage.

Horrigan suggests that the portion of Point C relating to Court of Appeals' refusal to have discussed Appellants' Sixth Point below presents no question because of the existence of adequate state grounds. But this court, in a closely-analogous case, held: "consideration of asserted constitutional rights may not be thwarted by the simple recitation that there has not been observance of a (state law) procedural rule with which there has been compliance in both substance and form, in every real sense."[11] The Sixth Point concerns serious abuse by the trial court by which these Philippine nationals have been denied access to a fair and impartial court of justice (*id.*).

V. JURISDICTION

Error implicating federal law is apparent on the face of the record, and it implicates mandatory federal jurisdiction under Article VI, Section 2[12] of the Constitution and under International law and treaties and compacts (Pet. for Cert. pp.20-23).

The Congress was required "to vest the whole judicial power of the United States"[13], as mandated by Article III, Section 2 of the Congress, in the Supreme Court in respect to "all cases" (U.S. Constitution, *id.*) arising under that power "to the utmost constitutional extent". This power and jurisdiction "... should be commensurate with mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever" (*Martin v. Hunter's Lessee*, *id.* at p.335), which may arise under federal

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[11] Quote is from *NAACP v. Alabama*, (1964) 377 US 288, 12 L.Ed. 2d 325, 84 S.Ct. 1302, at 12 L.Ed. page 332.

[12] Protection under Art. VI, Section 2 is omni-present and never requires pleading or proof beyond proof of circumstances falling under its protective umbrella [Restatement (Third) Foreign Relations Law of the United States § 13 comment a., p.61].

[13] *Martin v. Hunters Lessee*, 14 U.S. 304 (1816) at 330.

law and the Constitution. This clearly applies to cases "in which principles of the law and [of] comity of nations ... form an essential inquiry. All these cases ... enter into the national policy, affect the national rights, and may compromit the national sovereignty." (*Id.*) "It [the appellate jurisdiction of the U.S. Supreme Court] is, therefore, capable of embracing every case enumerated in the constitution, which is not exclusively to be decided by way of original jurisdiction" (*id.* at 337-38).

Petitioners have shown the court with certainty that rights assured to them under treaty, international law and comity are matters of federal concern (Pet. for Cert. pp.16, 20-23) and that these rights were asserted under foreign law and under international and federal concepts of comity (*id.* pp.7-16, 24-27) and under Art. VI, Sec. 2 of the U.S. Const. and treaties and compacts joined in and assented to by the U.S. (*id.* pp.20-23,27-30). They have shown they were denied access to mandatory adjudicatory functions of state courts (*id.* pp.12-16, 24-27) resulting in denial of justice under international law and under the 14th Amendment. The U.S. has joined other nations in treaties and compacts, giving assurance that its national courts would provide redress to aliens in such circumstances (*id.*, pp.20-23, 28-30).

CONCLUSION

These Petitioners have been divested of their Philippine titles without a showing in the record that Philippine law, though duly presented, has been consulted, discerned and declared on any issue controlled by it. They have been denied due trial and due appeal. Furthermore, Texas courts have installed two unwelcome members into the Gustilo family against express Philippine law and policies. The national conscience demands redress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Reply Brief were sent by certified mail on September 23rd, 1997, to each of the following counsel of record:

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Raymond M. Hill
RAYMOND M. HILL

APPENDICES:

Appendix 1: Tr. 2324 . . . . . A-1

Appendix 2: Tr. 1116-1117 - "Veloso Decision" . . . A-2

Appendix 3: Tr. 2123 - Sheriff's Return A-3
Tr. 2103 - Officers Return A-4

Appendix 4: Motion for Rehearing in Court of Appeals, p. 27, para 5, and p.33 . . . . A-6

Appendix 5: *Republic v. Marcos*, 182 SCRA 223 [1990] A-7

Appendix 6: Appellants Brief in Court of Appeals, Excerpt from pg. 25 . . . . . A-10

Appendix 7: Appellants Reply Brief in Court of Appeals, pg.5, esp. FN.8 . . . . . A-12

Appendix 8: Excerpts from Tr. 2287-2290: First Amended Motion for Judgment for Jose Vicente Gustilo, III, and Mary Joy Ann Gustilo) A-13

Appendix 9: Excerpts from Statement of Facts, pp.389-395 . . . . . A-16

Appendix 10 Excerpts from Tr. 2262-2270: First

Amended Motion for Judgment for Jose Vicente Gustilo, III, and Mary Joy Ann Gustilo A-18

Appellants' Brief, First Point: b, c, d, e, and f (Pages 5-7, Appellants' Brief, Court of Appeals) A-22

Excerpt from pages 22-23 of Amended Motion for Rehearing filed in Texas Supreme Court A-24

Appendix 11 Excerpt from Statement of Facts, pages 1704, 395, and 1632 . . . . . A-26

Appendix 12 Application for Declaration of Heirship filed by Gerardo Gustilo . . . A-27

Appendix 13 Resolution of the Supreme Court for the Republic of the Philippines, Third Division A-33

APPENDIX 1
(Tr. 2324)

REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
MANILA

CERTIFICATION

TO WHOM IT MAY CONCERN:

This is to certify that a petition for Annulment of Judgment entitled "JOSE GUSTILO III, VS. HON. JUDGE, RTC OF MAKATI, M.M., AND THE LOCAL REGISTRAR OF MAKATI, M.M.", was filed with this Court and DOCKETED CA-G.R. SP-No. 30760 today, April 20, 1993.

This certification is being issued upon the request of Atty. Leon Moya, Jr., counsel for the petitioner.

April 20, 1993.

TESSIE L. GATMAITAN
Clerk of Court

G.R. Nos. 4992274, 2337336
Date: April 20, 1993

APPENDIX 2
(Tr. 1116-1117 - "Veloso Decision")

Republic of the Philippines
REGIONAL TRIAL COURT
National Capital Judicial Region
BRANCH CXXXIII (133)
Makati, Metro Manila

NADINA G. MARAVILLA,
Petitioner,

-versus- SP.PROC.NO.M-130

LOCAL CIVIL REGISTRAR OF
MAKATI, METRO MANILA,
Respondent.
x - - - - - - - - - - - - - - x

O R D E R

Petitioner Nadina G. Maravilla filed this petition aimed at seeking the correction of entries on the certificate of birth of her daughter June Salvacion G. Maravilla.

The jurisdiction of the court having been established with the publication of the amended petition (Exhs. "G", "G-1" to "G-3"), and with proper notice to the Office of the Solicitor General, the Local Civil Registrar of Makati, Metro Manila, as well as respondents Francisco J. Maravilla and Armando C. Gustilo, this case was heard on December 6, 1984. During the hearing, nobody appeared to oppose the instant petition. Further, respondents Francisco Maravilla and Armando C. Gustilo have filed their written conformity to this petition (Exhs. "E", "F" and "D"). On motion of counsel for the petitioner, he was allowed to present evidence ex-parte.

. . .

(Text Omitted)

APPENDIX 3
(Tr. 2123 - Sheriff's Return
Tr. 2103 - Officers Return)

REPUBLIC OF THE PHILIPPINES
OFFICE OF THE JUDICIAL SHERIFF
NATIONAL CAPITAL JUDICIAL REGION
Makati, Metro Manila

NADINA G. MARAVILLA,
Petitioner,
-versus- SP. PROC. NO. M-130
THE LOCAL CIVIL REGISTRAR
OF MAKATI, METRO MANILA, ET AL.,
Defendants.
x - - - - - - - - - - - - - - - - - - x

SHERIFF'S RETURN

Diligent efforts were exerted by the undersigned to serve the attached summons together with the corresponding complaint issued by the Honorable Court in connection with the above-entitled case, but the cited defendant was always out of the said place (No. 4 J.C. Locsin St., BF Homes, Quezon City).

On November 6, 1983, undersigned undertook a substituted service, summons and the attached complaint (petition), was tendered to Mr. ALFONSO MARAVILLA, cousin of the defendant, a person of suitable age and discretion who is living in the said address, as evidenced by his signature on the copy of the attached summons and assured that these will be immediately forwarded to FRANCISCO J. MARAVILLA.

D U L Y S E R V E D.

Makati, Metro Manila, November 7, 1983.

ANTONIO JM. BAUTIETA
Deputy Sheriff

NADINA G. MARAVILLA,
Petitioner,
-versus- SP. PROC. NO. M-130
THE LOCAL CIVIL REGISTRAR
OF MAKATI, METRO MANILA,
FRANCISCO J. MARAVILLA
and ARMANDO GUSTILO,
Respondents.
x - - - - - - - - - - - - - - - - - x

OFFICERS RETURN

This is to certify that I have served copies of the herein attached ORDER, issued by the court in the above entitled petition, upon the following persons to wit :

1. Local Civil Registrar of Makati, Metro Manila — (September 27, 1983, thru Benito Samson, Chief, of said office, who acknowledged receipt hereof.

2. Armando C. Gustilo — (September 27, 1983, thru Vicky Amor, employee/secretary, at the office of the National Federation of Sugarcane Planters, 7th floor, Kalayaan bldg, Salcedo St. Makati, as evidence by her acknowledgement that appears of the right upper portion of the duplicate copy of said Order, dated September 22, 1983.

3. Solicitor General Office — (September 28, 1983, thru M. Escarda, receiving clerk of said office. who acknowledged receipt hereof, as evidenced by his acknowledgment that appears on the left upper portion

of the duplicate of said Order, dated September 22, 1983.

4. Francisco J. Maravilla — (October 3, 1983, served, thru Miss Shirely Vicente, domestic caretaker but refused to acknowledged or sign for an in behalf of Francisco J. Maravilla Jr., at No. 4 J. U. Locsin St. BF Homes Q. C.

MAKATI, METRO MANILA, OCTOBER 3, 1983.

FOR THE EX-OFFICIO SHERIFF:
By:

THE CLERK OF COURT
RTC, Branch 133
Makati, Metro Manila

Francisco P. Barnardino
Process Server

copy furnished:

counsel for the Petitioner.

APPENDIX 4

(Motion for Rehearing in Court of Appeals, p. 27, para 5)

5. The Supreme Court of the Philippines twice made generic determinations that any trial court, on pleadings to correct the record of a certificate of birth, was without jurisdiction or power to adjudicate filiation or heirship. *Republic v. Bartolome, supra*, and *V.D.A. DeCastro v. Republic, supra*. No decision by the Philippine Supreme Court **permitting the impugnation of legitimacy** by means of "correcting the registry" has been found.

(Motion for Rehearing in Court of Appeals, excerpt from p. 33)

(The order does not have sufficient summary judgment findings even if the findings were admissible. Neither impossibility of access under Philippine law nor evidence of insemination by Gustilo are supported by found facts.) *[Petitioners' Note: Parenthesis is in motion.]* The underlying error of the trial court and the error of the panel in denying a portion of the inheritance rights of Appellants and creating opposing inheritance rights of June Salvacion without notice and opportunity to have been heard, such claimed rights of June Salvacion not having established by a court invested with jurisdiction and authority sufficient for such purpose under controlling Philippine law constituted a denial of due process and also simple, reversible error. The error was fundamental, prejudicial and of such a nature as to require correction and demand reversal and rendition.

APPENDIX 5
(*Republic v. Marcos*, 182 SCRA 223 [1990])

THE SUPREME COURT OF THE PHILIPPINES
(FIRST DIVISION)

REPUBLIC OF THE PHILIPPINES, petitioner, *vs.* HON. PIO R. MARCOS, Judge of the Court of First Instance of Baguio and Benguet and PANG CHA QUEN representing the minor, MAY SIA alias MANMAN HUANG, respondents.

. . .

(Text Omitted)

PETITION for certiorari to review the order of the then Court of First Instance of Baguio and Benguet, Br. I. Marcos, J.

The facts are stated in the opinion of the Court.

Sinforoso Fangonil for private respondent.

GRINO-AQUINO, *J.:*

This is a petition for review of the order dated February 12, 1969 of respondent Judge Pio R. Marcos of the then Court of First Instance, now Regional Trial Court of Baguio and Benguet, granting the petition for change of name under Rule 103 of the rules of Court and authorizing "the name of the minor child May Sia alias Manman Huang, also known as Mary Pang [to] be changed to Mary Pang De la Cruz" (p. 12, Rollo).

On March 30, 1968, a verified petition was filed by private respondent Pang Cha Quen alleging that she is a citizen of Nationalist China, married to Alfredo De la Cruz, a Filipino citizen; that she had resided in Beguio City since her birth on January 29, 1930; that by a previous marriage to Sia Bian alias Huang Tzeh Lik, a citizen of Nationalist China, she gave birth to a daughter, May Sia alias Manman Huang on January 28, 1958 in the City of Manila; that on January 12, 1959, she caused her daughter to be registered as an alien under the name of Mary Pang, i.e., using the maternal surname, because the child's father had abandoned them; that her daughter has always used the name Mary Pang at home and in the Baguio Chinese Patriotic School where she studies; that on August 16, 1966,

petitioner Pang Cha Quen married Alfredo De la Cruz; that as her daughter has grown to love and recognize her stepfather, Alfredo De la Cruz, as her other father, she desires to adopt and use his surname "De la Cruz" in addition to her name "Mary Pang" so that her full name shall be Mary Pang De la Cruz; that Alfredo De la Cruz gave his conformity to the petition by signing at the bottom of the pleading . . ..

On April 4, 1968, respondent Judge issued an order setting the hearing of the petition on September 16, 1968 at 9:00 o'clock in the morning and inviting all interested persons to appear and show cause, if any, why the petition should not be granted. The order also directed that it be published at the expense of petitioner in the *Baguio and Midland Courier*, a newspaper of general circulation in Baguio City and Mountain Province, once a week for three (3) consecutive weeks, the first publication to be made as soon as possible. The order also commanded that the Solicitor General and the City Attorney of Gaguio be furnished copies of the order and petition.

On September 16, 1968, when the petition was called for hearing, nobody opposed it. Upon motion of petitioner's counsel, respondent Judge authorized the Clerk of Court or his deputy to receive the evidence of the petitioner, Pang Cha Quen.

Finding the petition meritorious, respondent Judge issued an order on February 12, 1969 authorizing the name of the minor, May Sia alias Manman Huang, also known as Mary Pang, to be changed to Mary Pang De la Cruz.

. . .

(Text omitted)

In its petition for review, the Government raised two *(2) issues namely: (1) whether or not respondent Judge had acquired jurisdiction over the case; and (2) whether respondent Judge erred in granting the petition although private respondent Pang Cha Quen failed to adduce proper and reasonable cause for changing the name of the minor "May Sia" alias "Manman Huang."

. . .

(Text omitted)

. . . The general rule is that a change of name should not be permitted if it will give a false impression of family relationship to another where none actually exists (Laperal vs. Republic, L-18008, October 30, 1962; Johnson vs. Republic, L-18284, April 30, 1963; Moore vs. Republic, L-18407, June 26, 1963.). In *Padilla vs. Republic*, 113 SCRA 789, we specifically held that our laws do not authorize legitimate children to adopt the surname of a person not their father, for to allow them to adopt the surname of their mother's husband, who is not their father, can result in confusion of their paternity.

Another reason for disallowing the petition for change of name is that it was not filed by the proper party.

. . .

(Text omitted)

Clearly, the petition for change of name must be filed by the person desiring to change his/her name, even if it may be signed and verified by some other person in his behalf. In this case, however, the petition was filed by Pang Cha Quen not by May Sia.

Hence, only May Sia herself, alias Manman Huang, alias Mary Pang, when she shall have reached the age of majority, may file the petition to change her name. The decision to change her name, the reason for the change, and the choice of a new name and surname shall be hers alone to make. It must be her personal decision. No one else may make it for her. The reason is obvious. When she grows up to adulthood, she may not want to use her stepfather's surname, nor any of the aliases chosen or her by her mother. ...

. . .

(Text omitted)

WHEREFORE, the petition for certiorari is granted, and the order appealed from is hereby reversed and set aside.

[Petitioners' Note: Other grounds included insufficiency of reasons to change name and failure to publish all aliases]

APPENDIX 6
(Appellants Brief in Court of Appeals
Excerpt from pg. 25)

There is no evidence that Francisco Maravilla, Jr. or any other person brought an action to impugn the legitimacy of June Salvacion at any time before her status as the child of such marriage became fixed under Philippine law. See Article 170 of the new Family Code of the Philippines and Article 263 of the Philippine Civil Code, which immediately preceded the new code. Mr. Horrigan refers to these articles as providing a statute of limitations. That is a large understatement. What they do is fix the status o the child irrevocably for purposes which are stated to be both public and important. Under comments regarding Article 170 in the Family Code of the Philippines this is explained in Volume 2, page 5 viz:

"Who May Impugn the Legitimacy of the Child

"It is submitted that only the husband, and in a proper case his heirs, can assail the legitimacy of a child. This is so because the husband is the one directly confronted with the scandal and ridicule brought about by the infidelity of his wife. He should be the one to decide whether to conceal the infidelity or expose it, in view of the moral implications and economic interests involved.

"But the action can be exercised only within a fixed time and only in a direct suit brought for the purpose (Macadangdang v. CA, 100 SCRA 73, 1980)."

In pertinent part, Article 263 of the Civil Code of the Philippines and Article 170 of the new Family Code of the Philippines, which succeeds it, also provide as follows:

"The action to impugn the legitimacy of the child shall be brought within one year from the record of the birth in the Civil Register."

On page 54 of the Family Code, a material comment referring to the time limitations for the bringing of an action to impugn the legitimacy of a child gives further clarification as follows:

> "Once these periods expire, no action may be entertained anymore by the court. Thereby, the status of the child as presumed by the law, shall become fixed. The status then can no longer be questioned in any other case or in any other forum."

Thus, the child acquires a status protected from any whim of a parent or other person seeking to disturb it. The affidavits of Francisco and Nadina Maravilla are incompetent to affect the true status of the child.

APPENDIX 7
(Appellants Reply Brief in Court of Appeals, pg.5, esp. FN.8)

iv) **Conclusory Constancia neither admissible nor conclusive.** The Constancia, which was relied upon by the Philippine and Texas courts, was not in compliance with either Section 13.21-22 of the Texas Family Code (§13.21-22 Texas Family Code, V.T.C.A.) (which has content and verification requirements not met) or the Philippine parallel law (Act No. 3753 Sec. 9); also see Philippine Family Code Art. 172 cited by Appellee to the trial court[8], which requires verification. Nor did the Constancia contain admissible averments of controlling facts regarding sexual contact by Gustilo or regarding impossibility of access by Maravilla. The Constancia was not admissible or conclusive on the issue of the filiation of June Salvacion; **for she had a presumed father.** June Salvacion met none of the Philippine Civil Code provisions of Art. 269 for legitimization (Article 177 New Family Code). Therefore, even recognition, had it been established, was impugned and contested by Jovi and by Mary Joy. See Article 286 of the Philippine Code so expressly permitting.

---

[8] The Family Code of the Philippines Explained, Lizaso, at page 57, makes this comment as to requirements for a public document under Article 172 cited by June Salvacion providing recognition of a legitimate child, viz: "**Public Document**. This is a document duly acknowledged before a notary public . . .." But see argument of Appellee at page 55 of the Statement of Facts, Pretrial Motions, April 5, 1993, asserting June Salvacion's complete satisfaction of Philippine law requirements under this Article. Other authority stresses that the document must be authentic and not a forgery and certainly not an un-proved private paper.

APPENDIX 8
(Excerpts from Tr. 2287-2290: First Amended Motion for Judgment for Jose Vicente Gustilo, III, and Mary Joy Ann Gustilo)

37. The six jury questions just enumerated [3, 4, 7, 8, 11 and 12] as well as Jury Questions No. 9 and 10, 15 and 16, 1 and 2, and 5, and 6, also fall for another reason. Each of such Jury Questions No. 1, 2, 3, 4, 7, 8, 11, 12, 9, and 10, and 15 and 16 and 5 and 6, relates to one or the other of two settlement agreements. Nadina Gustilo and June Salvacion relied upon a preliminary approval of those settlement agreements by the Probate Court in the Philippines. However, the Court of Appeals for the Republic of the Philippines, Seventh Division, Manila, determined that the approval of the Probate Court in the Philippines was in error and its Order as well as the agreements themselves were determined to be void ab initio, and Nadina Gustilo was ordered removed as administratrix of the Philippine Estate. The immediate effect of this in Texas was to remove all color of attempted compliance, if any, with Article 352 of the Texas Probate Code which is an unambiguous proscription against the personal representative becoming a purchaser directly or indirectly of any property of the estate. The Court is directed by statute as follows: "... such a sale shall be by the Court declared void, and shall be set aside by the Court ...". Such question was raised by Motion for Judgment or directed verdict at the close of all pleadings and at the close of evidence and by instructions upon which such issues if permitted should be conditional. But these were denied.

38. However one may attempt to cast the activity of Nadina Gustilo in entering into transactions by which she purported to obtain the right and title to properties and bank deposits in the United States and in Texas, such an activity would have required the approval of the Texas Probate Court whether under the Article just mentioned or other provisions of the Texas Probate Code. By seeking to avoid the claims of jose Vicente Gustilo, III, and Milagros Barco acting as the Guardian of Mary Joy Ann Gustilo, through the interposition of the alleged agreements and

matters arising out of the same or collateral thereto it became the burden of proponents of the agreements to establish the same as enforceable legal agreements.

39. They cannot even plead the Agreements without also facially showing their illegality now that any approval given them by the Philippine Court is reversed. They are void here and void there. Movants contend that the administratrix failed to comply with provisions of the Texas Probate Code as well as her obligations as a fiduciary under common law. Movants requested an instructed verdict for the reason that it was clear and beyond dispute that Nadina Gustilo, for herself and for her daughter, June Salvacion Gustilo, did not meet even minimal requirements of the Texas Probate Code in the transactions they assert to be their affirmative defenses. Now it is clear by the decision of the Appeals Court in the Philippines that Nadina Gustilo also did not meet the minimal provisions of the Philippine law in respect to such settlement agreements either. They have been determined to be void ab initio. For all of such reasons Jury Questions No. 3, 4, 7, 8, 11, 12, 9, and 10, and 15 and 16, 1 and 2, and 5 and 6, are all irrelevant and must be disregarded by the court in these proceedings.

40. A further objection exists in respect to Jury Questions 9 and 10. The questions were answered in the light of an overwhelming amount of totally inadmissible evidence. Mr. Horrigan took opportunity to argue to the jury not only the inadmissible evidence but the withdrawn and therefore doubly inadmissible conclusions reached by Mr. Ray, his expert witness. Mr. Ray's concluding testimony was that he could not offer an opinion about the fairness of the settlement agreements as of the dates upon which they were made. His previous testimony about fairness was based entirely upon what he considered to be the present - ie current, today, - tax consequences attending the estate, some seven years after the agreements were entered into. He completely established his past total unfamiliarity with the Philippine Tax code which he has never seen - even to date - nor did he have previous experience with even one Philippine client. His total experience regarding estate taxation of foreign domiciliaries was confined to one experience with a Mexican national.

His conclusions about whether the agreements would or would not be fair today in the light of the large tax burden he believed would be brought up against such interests is irrelevant but also highly prejudicial and can have no bearing upon whether or not the same were fair at the time they were made. The assessment of damages for unpaid taxes and penalties is another question which the successor to Nadina Gustilo as administratrix to the Philippine estate may well wish to pursue against Nadina Gustilo, but the subject should never have been considered as offered by a non-expert, in these proceedings.

APPENDIX 9
(Excerpts from Statement of Facts pp.389-395)

MR. HILL: Nadina Gustilo in her response to motion for partial summary judgment in the heirship proceeding, in denial of the heirship claim of Nadina Gustilo, paragraph 1 stated in clear, unambiguous terms the undisputed fact that -- and then there's paragraph roman numeral one and the title "Undisputed Facts." Item No. 1 under Undisputed Facts is, Nadina G. Gustilo, formerly known as -- . . . It's not an affidavit; it's a pleading [with attached affidavit]. "Nadina G. Gustilo, formerly known as Nadina Gonzaga married Francisco Maravilla Jr., on December 24, 1970, at Queen of Peace Church, a Catholic church in Bacalod City, Philippines."

Two, which is No. 3 in the response to motion for partial summary judgment, "The regional trial court of Negros Occidental, Sixth Judicial Regional Branch LX Cadiz City, Philippines, entered a court order on March 12, 1985, anulling the marriage between Nadina G. Gustilo, formerly known as Nadina Gonzaga and Francisco Maravilla Jr."

The movant respectfully requests the court, in view of the statements made in unambiguous, clear form in a pleading filed in this court by Nadina Gustilo for the purpose of obtaining judicial relief in these proceedings, to judicially admit the facts just stated in the motion. . . .

(Text omitted)

. . . We would ask the Court with respect to such judicial admission made in these proceedings to do the following: one, remove the question as to the marriage of Nadina G. Gustilo, formerly known as Nadina Gonzaga, the question of her marriage to Francisco Maravilla Jr. on December 24, 1970, from the province of the jury as an issue on this case. That there be offered neither evidence in favor of such matter or opposed to it, it being posed as an undisputed fact by Nadina Maravilla -- correction, Nadina Gustilo -- and accepted by the movants in this motion as being an established fact.

With respect to Item No. 2, the movant respectfully asks the Court to take judicial notice again of that recitation as an

undisputed fact in the response to motion for partial summary judgment just identified and remove from the province of the jury any question concerning whether or not an annulment occurred with respect to the marriage between Nadina Gonzaga and Francisco Maravilla Jr., and whether or not that marriage continued during any period of time, but to accept that it is judicially admitted that such marriage was annulled and terminated on March 12, 1985, by the regional trial court, Negros Occidental, for the Sixth Judicial Regional Branch LX, Cadiz City, and that no issue be submitted to the jury on such matter or any evidence permitted in these proceedings for or against such proposition.

Further, movant requests such other and further decisions and rulings by the Court as may be just and right in connection with and which would ordinarily flow from the establishment of the undisputed facts recited by the attorneys for Nadina Gustilo which have been accepted by the movant as being undisputed facts in this case; that it should not be the subject of admission of evidence or any issue which might be submitted to the Court.

That's my motion. We weren't able to obtain stipulations on the matters we asked for yesterday.

. . .

(Text Omitted)

THE COURT: Counsel, I don't think we are going to have a dispute that she got married to this guy in 1970 or that there was a civil annulment in '85.

MR. HILL: That's it. I want those two facts as evidence.

MRS. MEINEKE: They have already put on evidence regarding the 1970 --

THE COURT: I'm not going to prevent them from putting on additional evidence about it.

MR. HILL: Whether there was or wasn't a marriage in '70 or an annulment in '85?

MR. HORRIGAN: It's his burden. The law is clear.

THE COURT: I'm going to deny the motion.

APPENDIX 10

(Excerpts from Tr. 2262-2270: First Amended Motion for Judgment for Jose Vicente Gustilo, III, and Mary Joy Ann Gustilo)

I.

Status of Nadina Gustilo

1. The invalidity of the attempted marriage of Nadina G. Maravilla to Armando C. Gustilo in August of the year 1982 is apparent on the face of the record. The fact of the prior Maravilla marriage and of the civil annulment on March 12, 1985, terminating the marriage to Nadina G. Maravilla to Francisco Maravilla, Jr., may not be disputed and is established in this case as will be made plain below. The Petitioner in that Philippine annulment proceeding of March 12, 1985, was Nadina G. Maravilla. She pled her decree of annulment in this Court as an Exhibit "B" to her Response to Motion for Partial Summary Judgment in Heirship Proceeding and Denial of Heirship Claim of Nadina Gustilo and made at least six deliberate, unequivocal judicial admissions, any one of which is of sufficient gravity as to require issue preclusion regarding her claimed marriage and the continuing impediment of her prior marriage or an instruction against her and judgment against her on the issue of marital status without regard to any contrary jury determination. It is virtually certain that any order of this Court finding that Nadina Gustilo is the surviving spouse of Armando Gustilo will be contrary to both Texas and Philippine law and will cause a large continued wasting of estate assets in unavoidable and necessary measures toward rectification of conflicting decisions.

2. The jury answered Jury Question Number 23 "No". Jury Question Number 23 as answered was a finding against common law or informal marriage in Texas and was a finding against public holding out or cohabitation in Texas. The laws of the Republic of the Philippines and of the State of New Jersey do not provide for but prohibit common law marriages, and no

claim of common law marriage or ratification of prior void marriage was submitted in respect to either of such jurisdictions for that reason. There was no evidence of public holding out in Texas and the issue should have been decided as a matter of law. Jury Question No. 20 inquired solely about a matter concluded by law and should not have been submitted as an issue under the law and the facts of this case either.

3. The record in this case establishes, without dispute, the marriage of Nadina Gonzago to Francisco Maravilla, Jr., on the 24th day of December, 1970, or so she swears (See Plaintiff's Exhibit 783). Also see Exhibit "A" hereto.

4. In an affidavit attached to the aforesaid Response she swore to this Court that she obtained a Civil Annulment on March 12, 1985 (See Exhibit H attached to said Response). It is impossible to read the opinion of her own attorney William A. Veto (See her exhibit D) and the Philippine authority submitted by both sides and find a basis in the evidence for a judgment determining Nadina G. Gustilo to be the surviving spouse.

5. Nadina Gustilo repeated the same assertion, that civil annulment was obtained on March 12, 1985, in her Response to Second Motion for Partial Summary Judgment. Against see attached her own affidavit, Exhibit 1-C, swearing to the fact of the March 12, 1985 annulment and Veto's affidavit, 1-E.

6. Under the title "UNDISPUTED FACTS" in her Response to Motion for Partial Summary Judgment, Denial of Claim of Heirship of Nadina Gustilo; the said Nadina Gustilo has judicially admitted in this case as follows:

> "3) The Regional Trial Court of Negros Occidental, 6th Judicial Region, Branch LX Cadiz City, Philippines entered a Court Order on March 12, 1985 annulling the marriage between Nadina G. Gustilo f/k/a Nadina Gonzaga and Francisco J. Maravilla, Jr." (See her Response to Motion for Partial Summary Judgment In Heirship Proceeding and Denial of Heirship Claim of Nadina Gustilo). She attached the Order of Annulment reflecting that its alleged causes were force and coercion occurring same 14 years prior to the annul-

ment. And this Court gave those documents its full consideration in denying the Motion for Summary Judgment.

7. The date of annulment has been judicially admitted and cannot be denied. Nadina Gustilo's statements in her pleading regarding what she called "UNDISPUTED FACTS", her reassertion of the same statement in a subsequent Response, and her Affidavits accompanied by the decree of annulment as an exhibit to the First Response as all assertions upon which this Court has already relied in denying Movants' relief requested in their Motions for Partial Summary Judgment. They are, therefore, judicial admissions. They are not mere evidence for the jury, but judicial admissions. They prelude all contrary evidence.

8. The Republic of the Philippines Court of Appeals, Manila, Seventh Division (See Plaintiff Exhibit 38) in a proceeding involving the same parties as this proceeding and the same issues made a decision and included in it the following determinations:

(The decision was received in evidence without objection or limitation)

"The civil status of minor child, June Salvacion, and the validity/invalidity or existence of the marriage between Nadina and the deceased cannot be compromised". The Court noted concerning its consideration of the status of June Salvacion that "her birth certificate evidently shows that she is the daughter of private respondent, Nadina and one Francisco Maravilla, Jr., June Salvacion having been born on June 9, 1978 (Annex 2, page 27 records) or almost seven years before her mother's marriage to Maravilla was allegedly annulled. Private respondent claims that her marriage to Maravilla was annulled on March 12, 1985, and that she married the now deceased, Armando C. Gustilo, in August, 1982 or almost three years before her marriage to Maravilla was supposed to have been annulled, in which case her status and that of June Salvacion with respect to the deceased, Gustilo, are highly questionable". (Emphasis by Movants).

. . .

(Text Omitted)

12. The Court also has before it another sworn admission by Nadina Maravilla (now called Gustilo) as follows:

"3. Petitioner is legally married to Francisco J. Maravilla in a marriage which took place at Mary Queen of Peace Church, at Bacolod City, on December 24, 1970; photocopy of the marriage contract is hereto attached as Annex "A" and made an integral part hereof." (From sworn Petition of Nadina Maravilla for Correction of Entries in the Certificate of Birth, Affidavit follows below)

"I, Nadina G. Maravilla, of legal age, Filipino and resident of Bacolod City, Philippines, after having been duly sworn to (sic) in accordance with law do hereby depose and say: "That I am the Petitioner in the above entitled case and have caused the preparation of the foregoing Petition; and that I have read and understood all the contents of the same to be true and correct to the best of my personal knowledge and belief".

IN WITNESS HEREOF, I hereunto set my hand this _____ day of March, 1983, at Makati, Metro Manila,

S/ Nadina G. Maravilla
NADINA G. MARAVILLA

SUBSCRIBED AND SWORN to before me this 17th day of March, 1983, at Makati, Metro Manila, affiant exhibited to me her Res. Cert. No. A-15830730-P issued on March 16, 1983 at Bacolod City, Philippines.

S/ illegible
NOTARY PUBLIC
UNTIL DECEMBER 31, 1983
PTR NO. 0834826

Doc. No. 249
page No. 22
Book No. 42
Series of 1983

(Appellants' Brief, First Point: b, c, d, e, and f [Pages 5-7, Appellants' Brief, Court of Appeals])

FIRST POINT: Error of the Probate Court in not finding against the claims of Nadina (Maravilla) Gustilo . . . to be the surviving spouse and heir of Armando C. Gustilo, Deceased. The evidence conclusively establishes the opposite fact.

. . .

(Text Omitted)

b. Error of the Probate Court in refusing to accept admissions of Nadina Maravilla as being unopposed by any probative evidence and conclusive against her claim to be the surviving widow.

Ref.: Motion to Take Judicial Notice of a Response of Nadina Maravilla (which includes her affidavit) containing judicial admissions with issue-preclusive effect. S.F. 388-393; see also attempted separate offer of affidavit attached to offered Response - S.F. 308-310. Motion of Introduction of Admissions, April 22, 1993, Tr. 2071, and especially Tr. p. 2076 paragraph 3, subparagraph 10 S.F. 407-419 et seq.; Motion for Special Instructions dated, April 16, 1993, Tr. 2254; Motion for a Trial Order, April 15, 1993, Tr. 2950, at p. 2953; Motion in Limine, dated April 16, 1993, Tr. 2051 (overruled in limine request paragraph 14 on p. 2057), denied p. 129-130, Hearing on motions April 5, 1993, see also S.F. 480 for order.

c. Error of the Probate Court in failing to find, as a matter of law, that the Maravilla marriage continued until March 12, 1985, thus rendering void at its inception the second marriage.

Ref.: Same references as b and d.

d. Error of the Probate Court in permitting submission of Jury Question Number 20 over objection of Appellants that affirmative answer to that question was prohibited by judicial admissions and judicially established facts.

Ref.: Same reference as b; Esp. S.F.388-393 S.F. 1701 last two paragraphs through first line 1705.

e. Error of the Probate Court in denying Appellants' Motion for a Directed Verdict Denying Spousal Status and Heirship Claim of Appellee, Nadina (Maravilla) Gustilo. Appellants were entitled to judgment on admitted facts, conclusive evidence and judicially established facts conclusively establishing the opposite of Appellee's claims and there was no probative evidence supporting those claims.

Ref.: S.F.1545 through 1550; S.F. 1612, 1613, 1614.

f. Error of the Probate Court in denying Appellant's First Amended Motion for Judgment, denying spousal status and heirship claims of Appellee, Nadina (Maravilla) Gustilo.

Ref.: Tr.2262 at pages 2262-2278. Judgment at Tr. 2361.

(Excerpt from pages 22-23 of Amended Motion for Rehearing filed in Texas Supreme Court)

2. Nadina's Claims of a Prima Facie Case for a Valid Marriage to Gustilo

The question arises: What elements does Nadina claim she established with some evidence as a basis for her *prima facie* case? In the Republic of the Philippines, New Jersey, and Texas, the first and paramount element is capacity [Article 52, Civil Code of the Philippines, Paras, Ninth Ed., Vol. I, pp.242-43; New Jersey Revised Statutes 37:1-13, New Jersey Statutes Annotated; *Dacunzo v. Edgye*, 117 A.2d 503, New Jersey Supreme Court, Oct. 10, 1955; *Franklin v. Smallridge*, 616 S.W.2d 655 (Tex. Civ. App.--Corpus Christi 1981, no writ); *en banc* decision in *Phillips v. State*, 701 S.W.2d 875 (Tex. Crim. App. 1985, reh'g denied)]. Nadina had waived evidence on the question of her prior and continuing marriage to Maravilla, and Exhibit P73, her testimonial declaration to the same matter, was in evidence. **She was legally and morally barred from any attempt to prove capacity.** She produced no evidence of capacity [*Macadangdang v. Court of Appeals*, 199 Sup. Ct. Reports Ann. 73, (September 12, 1980) at page 84 reflects Philippine accord with Texas law: A marriage license in the Philippines is only evidence of the public act it evidences and is no evidence in respect to recitations of facts by the licensees or applicants.

It was Nadina's burden to prove her own claim to heirship. The void marriage license would have been of some use to her if she also had proved Texas domicile and Texas cohabitation after annulment of the Maravilla marriage. But Nadina failed in this respect and also did not obtain a finding of good faith (and could not have done so under her contrary sworn admissions). She did not establish any "gains" or "partnership of gains". The Spanish Civil Code theory of Caguioa (RNG Appendix 5), if it had not been repealed, still could not apply. The jury expressly found Nadina and Gustilo did not cohabit in Texas (where Gustilo was receiving medical treatment at the time of his death),

making it clear that any partnership of gains or co-ownership, if it ever existed, had terminated as early as her stay in Texas, where cohabitation, if it ever existed, had ceased. Her sole basis for a decision in her favor is her claim to have been **legally** married to Gustilo at the time of his death. This fails under New Jersey and Philippine law.

In an attempt to work a "back door", *ex parte* finding of filiation (and illegitimacy) of her daughter, June Salvacion, **Nadina not only renounced her marriage to Gustilo by claiming a marriage to Maravilla (P. Ex.73), she and her daughter, June Salvacion, solemnly continue to contend that Francisco Maravilla, Jr. and Armando Gustilo joined with them in formally approving the sworn claim of continuing marriage to Maravilla contained in the petition the three adults are claimed to embrace (Ex. P.73). June Salvacion is equally bound by the sworn petition by basing her claim to inheritance upon the resulting order of the court.** Also, by this pleading (Nadina's sworn petition), within seven months following her claimed marriage to Gustilo, she renounced any claim to be an innocent putative wife; for she conclusively demonstrated that she knew she was married to Maravilla at all pertinent times.

. . .

(Text Omitted)

APPENDIX 11

(Excerpt from Statement of Facts, page 1704)

. . .

(Text Omitted)

THE COURT: I understand that the issue that you are requesting me to give the jury instructs the jury to find that Nadina was not legally married to Armando. I am going to refuse that issue ....

. . .

(Text Omitted)

(Excerpt from Statement of Facts, page 395)

. . .

(Text Omitted)

THE COURT: Counsel, I don't think we are going to have a dispute that she got married to this guy in 1970 or that there was a civil annulment in '85.

. . .

(Text Omitted)

(Excerpt from Statement of Facts, page 1632)

. . .

(Text Omitted)

THE COURT: You have shown they got married in '82, an annulment in '85.

MR. HILL: I have shown absolutely authenticated information before this Court, the marriage certificate, her sworn petition saying she is married in Court. I have got also court findings on that issue, and attached to the court findings is the marriage license.

. . .

(Text Omitted)

APPENDIX 12
(Application for Declaration of Heirship filed by Gerardo Gustilo)

No. 214,659

IN RE THE ESTATE OF	§	IN THE PROBATE COURT
	§	
ARMANDO GUSTILO,	§	NUMBER ONE (1) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

APPLICATION FOR DECLARATION OF HEIRSHIP

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Gerardo Gustilo and files this his application for a declaratin of heirship in the above cause, and as ground therefor would respectfully show the following:

I.

The name of the Decedent is Armando C. Gustilo, who died intestate on December 19, 1986, in Houston, Texas.

II.

Applicant is the third cousin of the Decedent. Our grandfathers were first cousins, and we have a common great-great-grandfather, Bonifacio Gustilo.

III.

The names, residences, and interests of the Decedent's heirs, as well as their relaitonship to the Decedent, are as follows:

DECEDENT'S CHILDREN:

Mary Joy Anne Gustilo (a minor)

Born: September 6, 1977 in Fabrica, Negros Occidental, The Philippines.

Residence:
c/o Milagros Barco
6-B Avalon Condominiums
Ortigas Avenue, Greenhills, San Juan, Metro Manila, The Philippines

Relationship to the Decedent:

Daughter. Exhibit "A" hereto is a copy of her birth certificate, which bears the signature of the Decedent, who is named as her father on the face of said document, which is witnessed and authenticated as required by Section 42(b) of the Texas Probate Code.

Jose Vicente Gustilo III

Born: May 28, 1955 in Bacolod City, Negros Occidental, The Philippines.

Residence:

Aslon, Cadiz City, Negros Occidental, The Philippines
mail: c/o Nena Gustilo vda. de Varela
17th Street
Bacolod City, The Philippines

Relationship to the Decedent:

Son. Born to Ninfa Deriada out of wedlock. Acknowledged by Decedent as his son. Exhibit "B" is an affidavit of Decedent's brother and sister stating that Jose Vicente Gustilo III was always recognized by Decedent and by Decedent's relatives as Decedent's son. Exhibit "C" is a statement of the official custodian of the birth records, stating tha tthe birth record of Jose Vicente Gustilto III cannot be produced because same was destroyed in 1974 along with other records of births in Bacolod City for 1955. Exhibit "D" is a notarized legal document signed in october 1986 by Decedent shortly before his death recognizing this child as his son, along with Mary Joy Anne Gustilo and June Salvacion Gustilo. Exhibit "E" is another document signed by the Decedent recognizing this child as his son.

June Salvacion Gonzaga Maravilla

Born: June 9, 1978, in Bacolod City, The Philippines.

Residence:

c/o Nadina Gustilo
10 Marlin Drive
Whippany, New Jersey

Relationship to the Decedent:

Putative daughter. At the time of June's birth, her mother, Nadina Maravilla, was legally married to Francisco Maravilla, who was the father stated on the birth certificate, which is Exhibit "G" hereto. To my knowledge June was never legally adopted by the Decedent, although her mother, years later, succeeded in amending June's bireth certificate so as to make her illegitimate, with Decedent as her father. Decedent recognized June as his child (see Exhibit "D" hereto) but June was the legitimate child of Francisco Maravilla.

DECEDENT'S PUTATIVE WIFE

Nadina Gonzago, a.k.a. Nadina Gustilo and Nadina Maravilla.

Residence:

10 Marlin Drive
Whippany, New Jersey

Relationship to the Decedent:

None. Nadina was a private secretary to Decedent. Decedent, to my knowledge, never introduced her to others as his wife. Nadina, however, was always trying to pass herself off as a wife. She claims to be his wife by virtue of a purported marriage in New Jersey on August 21, 1982, at which time she was legally married to Francisco Maravilla, who was alive at the time of this void marriage. Her marriage to Francisco Maravilla lasted from December 24, 1974 until March 12, 1985. Exhibit "H" hereto is a copy of her sworn pleadings seeking to annul this marriage on grounds of duress. On the mariage certificcate for said 1982 marriage to Decedent, which is Exhibi t"I" hereto, Nadina misrepresented that this prior marriage had already been annulled.

MARRIAGE DURING DECEDENT'S LIFETIME:

Decedent was previoulsy married in the Philipnies to Consuelo Cuaycong. Applicant is not certain when the marriage began, but it ended when she died in a boating accident in the Philipines in 1980. Decedent adopted on child during this marriage, Lizette Gustilo, who also died in the same boating accident. There were no other children born to or adopted by

the Decedent in this marriage (other than the aforementioned illegitimates). Lizette had no children. Decedent was never legally married to anyone other than Consuelo Cuaycong.

DECEDENT'S PARENTS AND GRANDPARENTS:

All of Decedent's ancestors are deceased.

DECEDENT'S BROTHERS AND SISTERS:

Vicente Gustilo, Jr.

Residence:

Bacolod City, The Philippines.

Relationship to the Decedent:

Brother, legitimately born of the same mother and father as Decedent.

Imelda Ramos

Residence:

Cadiz City, The Philippines.

Relationship to Decedent:

Sister, legitimately born of the same mother and father as Decedent.

Nena Gustilo vda. de Varela

Residence:

17th Street
Bacolod City, The Philippines

Relationship to Decedent:

Sister, legitimately born of the same mother and father as Decedent.

A complete genealogy is appended hereto as Exhibit "F".

All children born to or adopted by Decedent have been listed. Each mariage of the Decedent has been listed, with the date of th emarriage, the name of the spouse, adn the date and place of termination thereof.

IV.

Decedent died intestate. Although this estate has been under the administration of Nadina Gustilo for three and one-half

years, neither she nor any party has moved to determine who the heirs of Armando Gustilo are.

V.

An Administratrix has had charge of the assets of this estte for over three years. Applicant does not vouch for the accuracy of her inventory and annual accountings on file in this cause, but has no independent m eans of knowing the property of the estate completely. Applicant is certain that Administratrix has hidden or embezzled large sums.

WHEREFORE, PREMISES CONSIDERED, Applicant prays that the court enter a declaration of heirship, and that he be granted any other and further relief which he may deserve at law or in equity.

Respectfully submitted,

WILMOT McCUTCHEN
Texas Bar No. 13511700
P.O. Box 701129
Houston, Texas 77270
(713) 868-3574

Attorney for Applicant

STATE OF TEXAS §

COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authoity, on this day personally appaered GERARDO GUSTILO, who, being by me first duly sworn, upon his oath declared the following:

"My name is GERARDO GUSTILO. I am over the age of eighteen and am in all ways legally competent to make this affidavit. I have red the foregoing Application for Declaration of Heirhsip and all factual statements therein are true in substance and in fact ot the best of my personal knowledge, and no

material fact or circumstance has been omitted from said application. I do not, hwoever, vouch for the accuracy of the third annual accounting submitted by the Adminstratrix.

/S/
GERARDO GUSTILO

Subscribed and sworn to before me this 11th day of April, 1991.

/S/
Notary Public

GINA TYSON
[SEAL] MY COMMISSION EXPIRES
April 1, 1995

CERTIFICATE OF SERVICE

This is to certify that on the 12 day of April, 1991, a true and correct copy of the foregoing was served upon the following counsel of record in this case by hand delivery.

Joseph S. Horrigan
Horrigan & Goehrs
1000 Two Houston Center
909 Fannin
Houston, Texas 77010-1005
Attorney ad Litem for June Gustilo

Ronald R. Niehaus
6363 Woodway, Suite 800
Houston, Texas 77057
Attorney for Nadina Gustilo, Individually and as Administratrix

/S/
WILMOT McCUTCHEN

APPENDIX 13
(Resolution of the Supreme Court for the Republic of the Philippines, Third Division)

Republic of the Philippines
Supreme Court
Manila

Third Division

Gentlemen:

Quoted hereunder, for your information, is a resolution of the Third Division of this Court dated MAR 23 1994.

G.R. No. 111237 (Nadina G. Gustilo, etc., et al vs. Court of Appeals, et al.). The Court deliberated on the motion for reconsideration or modification, dated March 8, 1994, filed by counsel for petitiners of the resolution dated January 26, 1994 which denied the petition for review on certiorari as no reversible error was committed by the appellate court. It appears to the Court that the motion merely reiterates the same arguments earlier raised and does not present any substantial reasons not previously invoked nor any matters not already considered and passed upon by the Court.

ACCORDINGLY, the Court Resolved to *DENY* the motion for reconsideration for lack of merit. This denial is ***FINAL***.

The Court further Resolved to ***NOTE WITHOUT ACTION***:

(a) the motion to admit corrected motion for reconsideration or modification dated March 19, 1994, filed by said counsel for petitioners; and

(b) the aforesaid corrected motion for reconsideration or modification.

Very truly yours,
JULIETA Y. CARREO
Clerk of Court

By:
ALFREDO P. MARASIGAN, JR.
Asst. Div. Clerk of Court
The Judgment Division
Supreme Court, Manila

Supreme Court, U.S.
FILED
SEP 26 1997
CLERK

(7)

No. 97-136

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MARY JOY ANN GUSTILO and
JOSE VICENTE GUSTILO, III,
PETITIONERS

v.

NADINA (MARAVILLA) GUSTILO, Individually
and as Former Administratrix of
The Estate of Armando C. Gustilo, Deceased,
and as Guardian of June Salvacion (Maravilla)
Gustilo; JOSEPH S. HORRIGAN, as Guardian Ad Litem
and Attorney Ad Litem of June Salvacion Gustilo;
and the KANALY TRUST COMPANY, as Administrator
of the Estate of Armando C. Gustilo, Deceased,
RESPONDENTS

On Petition for Writ of Certiorari to the
Fourteenth Court of Appeals for the State of Texas

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF ERROR

RAYMOND M. HILL
Counsel of Record for Petitioners
WILLIAM S. HART
RICHARD L. DANIELS
Hill, Hart & Daniels
2650 Fountainview, Suite 416
Houston, Texas 77057
(713) 917-0966

52 pgs

LIST OF PARTIES

The parties to the proceeding below set forth in the caption are as follows:

1. Mary Joy Ann Gustilo
2. Jose Vicente Gustilo, III
3. Nadina Maravilla Gustilo
4. Joseph A. Horrigan
5. June Salvacion Gustilo
6. Kanaly Trust Company

TABLE OF CONTENTS

Page

I. This Supplemental Brief Contains Subject Matter Not Previously Discussed Which is Newly Discovered and of Extraordinary Importance and Relevance to Issues in This Appeal 1

II. Jurisdiction Concerning Matters Raised in This Supplemental Brief 1

III. Statement of the Facts 2

IV. A Question Regarding Deference to be Accorded Findings of Opinion 5

V. Summary of Argument 6

VI. Brief of Argument 6

CONCLUSION 10

CERTIFICATE OF SERVICE 11

APPENDICES

Appendix S1: Excerpt from Memo of February 20, 1997 from Chief Justice Paul Murphy to Justice Richard Edelman (Exhibit 7 to Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy A-1

Appendix S2: Excerpt from Affidavit of Leslie Brock Yates (Exhibit 1 to Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734,

Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy [paragraph 3]) A-2

Appendix S3: Excerpt from Affidavit of J. Harvey Hudson (Exhibit 3 to Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy [paragraphs 1, 5 & 12]) A-3

Appendix S4: Excerpt from Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy, at page 2 . . . . . A-6

Appendix S5: Excerpts from Pages 14 - 17 of Motion for Rehearing En Banc A-7

Appendix S6: Excerpts from Pages 17-19 and 24-29 of Motion for Rehearing En Banc A-12

Appendix S7: Excerpts from Pages 21-23 and 29-30 of Motion for Rehearing En Banc A-21

Appendix S8: Excerpts from Pages 6-13 of Motion for Rehearing En Banc A-28

TABLE OF AUTHORITIES

Page

Texas Cases

Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996) 7

Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 363 (Tex. 1971) 9

Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816 (Tex. 1984, reh'g denied) 9

Commissioners Court v. Agan, 940 S.W.2d 77 (Tex. 1977) 7

Dryer v. Greens, 871 S.W.2d 697, 701 (Tex. 1993) 9

Edinberg Cons'd Sch. Dist. v. INA and CIGNA, 806 S.W.2d 910 (Tex. App.--Corpus Christi 1991, no writ) . . . 9

Gannon v. Payne, 706 S.W.2d 304 (Tex. 1986) 8

Garza v. Maverick Market, Inc., 768 S.W.2d 273 (Tex. 1989) 9

Houston First American Savings v. Musick, 650 S.W.2d 764 (Tex. 1983) 8

Huckin v. Connor, 928 S.W.2d 180 (Tex.App.--Houston [14th Dist.] 1996, reh'g overruled) 8

Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996) 7

Joplin v. Meadows, 623 S.W.2d 442 (Tex. Civ. App.--Texarkana 1981, no writ) 9

Memorial Hospital v. McCown, 927 S.W.2d 1 (Tex. 1996) . 7

Mendosa v. Fidelity & Guar. Ins. Underwriters, Inc., 606 S.W.2d 692 (Tex.1980) 8

Mitchell Energy Corp. v. Ashworth, 943 S.W.2d 436 (Tex. 1977) 7

Moore v. Neff, 629 S.W.2d 827 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.) 8

Robertson v. Estate of McKnight, 609 S.W.2d 534 (Tex. 1981) 8

Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986) . 8

Silva, as next friend of E.L.S. v. Enz, as Admin. and next friend of Jason Eng, 853 S.W.2d 815 (Tex. App.-- Corpus Christi 1993, writ denied) 9

United States Aviation Underwriters v. Olympia Wings, Inc. v. Aetna, 896 F.2d 949 (C.A.5) (Tex. 1990) 9

Valdez v. Moore, 476 S.W.2d 936 (Tex. Civ. App.-- Houston [14th Dist.] 1972, writ ref'd n.r.e.) 8

Philippine Cases

Republic v. Bartolome, Vol. 138 Sup. Ct. Reports Ann. 442, Sept. 8, 1985 9

V.D.A. DeCastro v. Republic, Vol. 134 Sup. Ct. Reports Ann. p.14, January 27, 1985 9

New Jersey Cases

Dakuno v. Edgye, 117 A.2d 508 (N.J. Sup. Ct. 1955) . . . 9

Philippine Cases Involving the Parties to this Appeal

Gustilo v. Agdamag, CA-G.R. SP. No. 28626, Republic of the Phlippines, Court of Appeals, Manila, Seventh Division, 1993 8

Texas Constitution

Texas Constitution Article 5, Section 6 5

Texas Statutes

Rule 9(f) Texas Rules of Appellate Procedure 3, 6, 7

Rule 9(e), Texas Rules of Appellate Procedure 2, 6, 7

Rule 00(c), Texas Rules of Appellate Procedure . . . 2, 6, 7

Rule 00(f), Texas Rules of Appellate Procedure . . . 2, 6, 7

Section 22.223(b) Texas Gov't Code Ann. (Vernon 1988) 3, 6, 7

Philippine Statutes

Civil Code of the Philippines Ann. 9th Ed., 1978, Artice 15 9

Civil Code of the Philippines Ann. 9th Ed., 1978, Artice 71 9

Civil Code of the Philippines Ann. 9th Ed., 1978, Article 255 8

Civil Code of the Philippines Ann. 9th Ed., 1978, Article 256 9

Civil Code of the Philippines Ann. 9th Ed., 1978, Article 263 9

Civil Code of the Philippines Ann. 9th Ed., 1978, Article 2035 8

Secondary Sources

Petition for Writ of Mandamus filed in No. 97-734, *The Honorable Wanda McKee Fowler, John S. Anderson, Richard H. Edelman, J. Harvey Hudson, and Leslie Brock Yates, Justices of the Fourteenth Court of Appeals, Relators, v. The Honorable Paul C. Murphy, Chief Justice of the Fourteenth Court of Appeals*, In the Supreme Court of Texas 1

Amicus Curia Brief filed by Richard N. Countiss in No. 97-734, *The Honorable Wanda McKee Fowler, John S. Anderson, Richard H. Edelman, J. Harvey Hudson, and Leslie Brock Yates, Justices of the Fourteenth Court of Appeals, Relators, v. The Honorable Paul C. Murphy, Chief Justice of the Fourteenth Court of Appeals*, In the Supreme Court of Texas 1

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF ERROR

I.

This Supplemental Brief Contains Subject Matter Not Previously Discussed Which is Newly Discovered and of Extraordinary Importance and Relevance to Issues in This Appeal

This supplemental brief is largely the result of receipt of an amicus curiae brief earlier this day (September 24, 1997) filed by a Richard N. Countiss, a former Justice of the Texas Seventh Court of Appeals, who, from the inside, saw the denial of justice and want of full and due process visited upon litigants by a "turf" dispute being carried out in Fourteenth Court of Appeals.[1]

II.

Jurisdiction Concerning Matters Raised in This Supplemental Brief

The Supreme Court has jurisdiction of this case as set forth in the Petition for Writ of Certiorari and Petitioners' Reply Brief. This Supplemental Brief concerns matters having the specific, serious and cumulative effect of denying justice and due

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[1] A mandamus proceeding, *Leslie Brock Yates, John S. Anderson, J. Harvey Hudson, Wanda McKee Fowler, and Richard H. Edelman, Justices of the Fourteenth Court of Appeals, Relators, v. The Honorable Paul C. Murphy, Chief Justice of the Fourteenth Court of Appeals, Respondent*, No. 97-0734, arose in the last days of August. Though Petitioners were aware of a dispute in the court, the clear implications concerning effects upon these litigants of the court's practices were just made clear to them by their receipt today of an amicus curiae brief bearing a certificate of service dated September 18, 1997 and probably filed the next day.

process to Petitioners.[2] As such, redress must be afforded in the national courts as required by previously-cited international law and domestic constitutional concerns.

III.

Statement of the Facts

Petitioners attach in appendices relevant excerpts from the affidavits and judicial declarations (pleadings) of six of nine sitting judges of the Court of Appeals for the Fourteenth District of Texas ("14th Court of Appeals"). These and related documents show beyond controversy that Petitioners have been denied full access to mandated adjudicatory duties of the court as provided, *inter alia*, by state procedural rules and statutes, viz:

1. Under Rule 79(e) Texas Rules of Appellate Procedure, any justice receiving a circulated appellate brief or motion for rehearing en banc may request a vote of the en banc court to hear or to rehear a case en banc.

2. Under Rule 100(c) Texas Rules of Appellate Procedure, any justice receiving a circulated motion for rehearing may, if joined by a sufficient number of justices to constitute a majority of the court, require that the motion for rehearing be granted.

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[2] The facts upon which this supplemental brief stands are not in dispute and are based upon the affidavits and sworn pleadings of six of the nine sitting justices of the Fourteenth Court of Appeals. The three remaining Justices have not contested them. Prejudice to these specific Petitioners is distinct and particular to them and arises, in part, from failure of the relatively inexperienced panel handling their appeal to have properly performed mandatory functions of the Court which, in due course of correct procedure, would have been corrected when brought to the attention of the full court (a presumption may not be indulged that the full court would not have done its duty if permitted to do so).

3. Under Rule 100(f) Texas Rules of Appellate Procedure, a majority of the justices, with or without a motion, may call for an en banc review with or without an en banc conference.

4. Under Section 22.223(b) Texas Gov't Code Ann. (Vernon 1988), the concurrence of a majority of the court sitting en banc is necessary for a decision. Thus denial of a motion for an en banc rehearing by the Chief Justice, without circulation of the entire court, is beyond his authority and works an obvious denial of due and fair hearing upon the movant.

5. Under Rule 19(f) Texas Rules of Appellate Procedure, a "Single Justice or Judge ... may not act upon a motion ... for rehearing."

The present chief Justice of the 14th Court of Appeals has abolished "full-court circulation", and justices of the court are not permitted to vote "en banc" (see excerpts of Memo from Chief Justice Paul Murphy to Justice Richard Edelman February 20, 1997, attached to Affidavit of Justice Edelman (Appendix S1 hereto); also excerpts from affidavits of Yates and Hudson (Appendices S2 and S3 hereto).

Five justices of the 14th Court of Appeals have stated that "Requests for en banc consideration are not circulated among the full court", and, when en banc consideration is requested by a Justice, decisions to grant or deny such motions are made solely by the Chief Justice, Paul Murphy. (Excerpt from Petition for Writ of Mandamus under oath and signed by each of five Relators, and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy, at page 2, Appendix S4).

The first paragraph, under "STATEMENT OF THE FACTS" of sworn Petition for Mandamus signed by Justices Leslie Brock Yates, John S. Anderson, J. Harvey Hudson, Wanda McKee Fowler, and Richard H. Edelman states as follows:

> "Since at least January of 1995, when Relators began serving thereon, the Fourteenth Court of Appeals has never voted on whether to consider a motion for rehearing en banc. *(Ex. 1, para. 3).*" Requests for en banc consideration are not circulated among the full Court, and even when en banc consideration is requested by a Justice, decisions to grant or deny such motions are made solely by Respondent. *(Ex. 1, para. 3; 3, para. 1, 5 & 12).*"

Just-discovered disorder, averred in affidavits and pleadings of six justices, is shown to have prevailed during the pendency of this appeal, especially during the pendency before the court of a motion for rehearing and a motion for rehearing en banc filed in this case July 18, 1996. Wholesale departure of appellate court from its prescribed duties, functions, customs and practices and from controlling law denied these alien petitioners all opportunity to acquaint potentially-interested senior members[3] of the court with the substance of appellate issues, exceptions and proposed corrections of the opinion of the then basically novice panel.

Under particular circumstances of this case, opportunity for prejudice was great. Consequences of aborted opportunity for rehearing have predictably led to extraordinary circumstances prevailing in this appeal, viz: (1) case has been determined on basis of assumptions not borne out by record, (2) central controlling issues of Philippine law upon which rights of Petitioners depend have not been discussed or considered, and (3) rules of law have been adopted on mistaken misapplication of decisions of intermediate courts found to be in conflict with authority of Texas Supreme Court. Thorough and fully-supported motions for rehearing and for rehearing en banc filed by Petitioners

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[3] Of the three justices on the panel that decided this case, two were elected to begin service in 1995. The third had recently succeeded by appointment to Justice Murphy's seat which became vacant upon his appointment to Chief Justice.

(Appellants below) demonstrated error and mistake in three categories just stated. Respect for law requires a presumption that objective errors of the Court of Appeals would have been corrected and greater deference would have been given controlling Supreme Court and Philippine authority if the full court had been circulated with Petitioners' motion for rehearing en banc. A right, protected under law, for an opportunity to persuade the full court to review the adverse panel decision was denied in a manner that did not comport with any recognizable process of law.

IV.

A Question Regarding Deference to be Accorded Findings of Opinion

Of equal concern to bench and bar are facts made clear from the affidavits and counter-affidavits that not one of the six embroiled Justices has evidenced in those writings a "due process" or "open access to the court" concern as regards the fate and fortunes of litigants before the court. No mention is made of the responsibility the court exercises as the ultimate finder of facts under the Texas Constitution Article 5, Section 6. The effort and considerable expense required for adequate documentation of en banc rehearings so that each justice will have convenient reference to necessary facts and authority is disparaged by evident non-concern. A question is unavoidably raised as to the integrity of a court (or faction of a court) that invites expensive, but essentially useless, motions for rehearing. Then there is the further concern for the review process in the Texas Supreme Court where questions must first be narrowed and pressed upon the court of appeals so that application for writ of error may be narrow and precise and necessary only where the intermediate court fails to correct itself. Certain error occurs only when the court rules. Should the court never confront its own error? By reason of the court's clear disregard of these matters, Petitioners contend that deference to the court's findings, in the face of compelling and objectively contradictory

record evidence, should be made subservient to the demands of justice in this appeal.

V.

Summary of Argument

Alien Petitioners were deprived of their rights to require circulation of Motion for Rehearing and Motion for Rehearing En Banc to all Justices of the appellate court.

Alien Petitioners were denied their opportunity for rehearing en banc or rehearing as result of unauthorized decision of Chief Justice or of panel in absence of any circulation of motions among all Justices of the court.

Because Motion for Rehearing and Motion for Rehearing En Banc met necessary criteria for rehearing, illegal decisions, by which circulation of motions was denied and by which motions were rejected, resulted in prejudice to alien Petitioners, denial of justice, and denial of due process.[4]

VI.

Brief of Argument

Petitioners are entitled to all rights dependent upon adherence by appellate court to explicit rules by which it is governed. Petitioners' right to have motion for rehearing en banc and motion for rehearing circulated among the justices of the court and to have those motions not under exclusive control of a panel or a Chief Justice hang upon law that is directory and explicit--i.e., Rules 79(e); 100(c),(f); 19(f) Texas Rules of Appellate Procedure and Section 22.223(b) Texas Government Code Ann.

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[4] Factually incorrect opinion, ruling on a defense not raised, unfairly handiccped appeal.

(Vernon, 1988). The following is borrowed from mandamus brief of a majority of the court, at page 5 and note 7 on same page, viz:

> "The Fourteenth Court of Appeals is not in compliance with either Rule 79(e) of the Texas Rules of Appellate Procedure or Section 22.223 of the Government Code. These provisions are not advisory, but are, by their terms, mandatory.[7] . . . Interpretation of a statute is a pure question of law over which a judge has no discretion. *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex. 1977). Thus, a judge's erroneous legal conclusions, even in an unsettled area of the law, is an abuse of discretion. *See Huie v. DeShazo*, 922 S.W.2d 920, 927-28 (Tex. 1996). . . .
>
> "[7] Where a statute is clear and unambiguous, it must be interpreted and applied according to the plain and common meaning of the words and terms used. *Commissioners Court v. Agan*, 940 S.W.2d 77, 80 (Tex. 1977); *Memorial Hospital v. McCown*, 927 S.W.2d 1, 4 (Tex. 1996). *But cf. Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996) (stating that statutory language that appears to impose a mandatory duty may be interpreted to be only directory when necessary to fulfill the legislative intent of the statute); [other citations omitted]."

It follows that the arguments concerning effect of Rule 79(e) and Section 22.223 of the Government Code apply as well to Rule 100(c) and (f) and Rule 19(f). Thus it is ironically clear that a majority of the court, in effect, agrees that Petitioners have been denied mandatory and due process in their court. Petitioners' right to a minimum of remand is not in doubt, though an even greater right to reversal under Philippine (and Texas) law is established by the Petition for Writ of Certiorari.

Non-circulation of motions for rehearing en banc and for rehearing denied Petitioners statutory opportunity for correciton of error as pointed out in the motions. The following is digested from the motions:

Panel held that judicially-admitted fact **must also be established by admitted evidence**. Conflicts with *Houston First American Savings v. Musick*, 650 S.W.2d 764 (Tex. 1983) and *Valdez v. Moore*, 476 S.W.2d 936, 939-40 (Tex. Civ. App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.). Panel also holds that sworn testimonial declaration in prior suit (petition under oath), otherwise meeting Mendosa (infra) tests, fails as preclusive declaration **because made in different suit**. Conflicts with *Mendosa v. Fidelity & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692 (Tex. 1980); *Moore v. Neff*, 629 S.W.2d 827 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.); and *Huckin v. Connor*, 928 S.W.2d 180 (Tex.App.--Houston [14th Dist.] 1996, reh'g overruled). (From motion for rehearing en banc pp.14-17. See Appendix S5 hereto at pp.A-7 - A-11.)

Panel held it was not bound to follow determination by Philippine intermediate court determining invalidity, under Philippine law, of Philippine agreement between Philippine citizens. **(Opinion was affirmed by Philippine Supreme Court.)** Conflicts with decisions of the Texas Supreme Court, viz: *Gannon v. Payne*, 706 S.W.2d 304 (Tex. 1986); *Robertson v. Estate of McKnight*, 609 S.W.2d 534, 537 (Tex. 1981); and *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986). Panel opinion also conflicts with Philippine statutory law and other Philippine Appellate Court decisions upon exclusively Philippine questions of impugnation of legitimacy and filiation and succession of Philippine children. See Civil Code of the Philippines Ann. 9th Ed., 1978, Article 2035 (Appendix W, Petition for Writ of Certiorari [hereafter "Pet. for Writ"]); *Gustilo v. Agdamag*, CA-G.R. SP. No. 28626, Republic of the Philippines, Court of Appeals, Manila, Seventh Division, 1993 (Appendix I, Pet. for Writ); Civil Code of the Philippines Ann. 9th Ed., 1978, Article 255 (Appendix M, Pet. for Writ); Civil

Code of the Philippines Ann. 9th Ed., 1978, Article 256 (Appendix M, Pet. for Writ); Civil Code of the Philippines Ann. 9th Ed., 1978, Article 263 (Appendix K, Pet. for Writ); *Republic v. Bartolome*, Vol. 138 Sup. Ct. Reports Ann. 442, Sept. 8, 1985 (Appendix O, Pet. for Writ); *V.D.A. DeCastro v. Republic*, Vol. 134 Sup. Ct. Reports Ann. p.14, January 27, 1985 (Appendix P, Pet. for Writ); Civil Code of the Philippines Ann. 9th Ed., 1978, Article 15 (Appendix Q, Pet. for Writ); Civil Code of the Philippines Ann. 9th Ed., 1978, Article 71 (Appendix R, Pet. for Writ); and *Dakunzo v. Edgye*, 117 A.2d 508 (N.J. Sup. Ct. 1955). (From Motion for Rehearing En Banc pp.17-19 and 24-25, Appendix S5 at pp.A-12 - A-20.)

Panel held recitations in **ex parte, agreed judgment** to be **binding findings of fact, affecting the rights of Petitioners** . (The rights of Appellants were diminished without either Appellant having been afforded due process of law.) Conflicts with *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971); *Garza v. Maverick Market, Inc.*, 768 S.W.2d 273 (Tex. 1989); *United States Aviation Underwriters v. Olympia Wings, Inc. v. Aetna*, 896 F.2d 949 (C.A.5) (Tex. 1990); *Silva, as next friend of E.L.S. v. Enz, as Admin. and next friend of Jason Eng*, 853 S.W.2d 815 (Tex. App.--Corpus Christi 1993, writ denied); *Joplin v. Meadows*, 623 S.W.2d 442 (Tex. Civ. App.--Texarkana 1981, no writ). Panel decision deprived appellants of due process by concluding against appellants **agreed, ex parte findings of different court, with respect to which Petitioners had neither notice nor an opportunity to participate** were erroneously made conclusive against them. Conflicts with *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816 (Tex. 1984, reh'g denied); *United States Aviation Underwriters v. Olympia Wings, Inc. v. Aetna*, 896 F.2d 949 (C.A.5) (Tex. 1990); and *Edinberg Cons'd Sch. Dist. v. INA and CIGNA*, 806 S.W.2d 910 (Tex. App.--Corpus Christi 1991, no writ). (From Motion for Rehearing En Banc pp.21-23 and 29-30. See Appendix S5 hereto at pp.A-21 - A-27.)

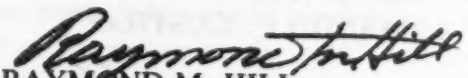
Petitioners' Reply Brief points out numerous examples of the appellate courts having adopted facts not in the record. That court's entire basis for rejecting the Philippine decision finding agreements to be void is outside the record factually (see Appendix S8 hereto at pp.A-28 - A-32) and relies upon a defense not raised or briefed by Respondents before the opinion--i.e., that the Veloso decision was issue preclusive. See Appendix S7 hereto at p.A-15 (from the Motion for Rehearing En Banc).

From the foregoing it is apparent that Petitioners had substantial opportunity based upon attendant rights that was foreclosed by the unlawful practices of the Fourteenth Court of Appeals--practices that not only chilled prospects of a rehearing, but virtually denied such a possibility. This was impermissible denial of justice and due process.

CONCLUSION

The writ of certiorari must issue as prayed, and the opinion below must be reversed to conclude this litigation. If remanded, instructions on matters of comity must be complete. The court below must address every controlling issue not disposed of by the Supreme Court. All other relief which comports with justice is requested.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Supplemental Brief in Support of Application or Writ of Error were sent by certified mail on September 25, 1997, to each of the following counsel of record:

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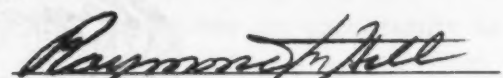

RAYMOND M. HILL

APPENDIX S1

Excerpt from Memo of February 20, 1997 from Chief Justice Paul Murphy to Justice Richard Edelman (Exhibit 7 to Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy)

To: Justice Richard Edelman

From: Chief Justice Paul Murphy

Subject: Memo of February Judges Meeting

Date: February 20, 1997

. . .

(Text Omitted)

En Banc Decisions: This Court's past experience with full-court circulation was mercifully brief. Several years ago, one of the former judges suggested this procedure. Judge Brown as I recall, reluctantly agreed. As it turned out, it became a burden for the judges and the staff. Copying the motions, making copies of the opinions (usually lengthy in these cases), and distributing the motions became an administrative nightmare for the staff. After circulation, some judge would inevitably claim that he had not received a copy despite the staff's records showing distribution and extra copying ensued. Some judges insisted on copies of all briefs filed in the case, requiring more copying time. Obtaining timely rulings became extremely time consuming. Some judges wouldn't take the time to read them or would vote without give the motion any consideration. Keeping abreast of all the motions and rulings in a timely manner was taking an inordinate amount of time from opinion writing especially when the opinion was from another panel. The result was an unacceptable delay in rulings on the motion and a thankful early return to the way it had been done.

APPENDIX S2

Excerpt from Affidavit of Leslie Brock Yates (Exhibit 1 to Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy [paragraph 3])

"3. Since joining the Court in December of 1994, I have not been asked to vote on other matters of Court business, including budgets, Court Expenditures and Court security. Neither have I been asked to vote on, nor express an opinion about, whether a case should be granted an en banc rehearing."

APPENDIX S3

Excerpt from Affidavit of J. Harvey Hudson (Exhibit 3 to Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy [paragraphs 1, 5 & 12])

"1. In late October or early November of 1995, I met with Chief Justice Murphy regarding a difficult case that was on rehearing before the panel.[1] The panel had been divided on original submission and was divided on rehearing as well. Because the panel was split and one Justice was having difficulty deciding the motion for rehearing, I asked that the cause be reconsidered en banc pursuant to Rule 100(f) of the Rules of appellate Procedure. Chief Justice Murphy denied my request without a vote of the other justices.

. . .

(Text Omitted)

"5. During the early part of March 1997, I asked Chief Justice Murphy to grant appellants'

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[1] I have intentionally omitted the style and cause number of cases referenced in this affidavit. See TEX. CODE JUD. CONDUCT, Canon 3, p.3(b)(11) (1996).

request for rehearing en banc in a case that had been decided by a plurality opinion. When appellants filed a motion for rehearing en banc, I told Chief Justice Murphy that I would grant such motion and asked for an en banc rehearing because (1) the panel had been unable to reach a majority opinion and (2) the plurality opinion was in conflict with the previous decision of another panel. Chief Justice Murphy did not expressly deny my request at that time, but simply advised me to try again to get a majority of the panel members to agree. Although the panel was never able to render a majority opinion, appellant's motion for rehearing en banc was subsequently denied without a vote of the Justices.

. . .

(Text Omitted)

"12. On the last week of June or first week of July 1997, I gave a written memo to Chief Justice Murphy stating that I would vote to grant the appellee's motion for rehearing en banc in a case where the panel had reversed the trial court's judgment on the basis of a prior decision by the Fourteenth Court of Appeals. However, the panel opinion had questioned the soundness of the Court's former decision. Chief Justice Murphy advised me that he wanted to know how the panel members would vote, and I submitted

a memo to him reflecting that all three panel members would grant en banc rehearing and that Justice Fowler had specifically requested a vote on the matter. Thereafter, Chief Justice Murphy advised me that he had overruled the motion for rehearing en banc. The issue was not presented to the full Court."

APPENDIX S4

Excerpt from Petition for Writ of Mandamus and Brief in Support of the Petition filed in No. 97-0734, Leslie Brock Yates, et al. v. The Honorable Paul C. Murphy, at page 2

"Requests for en banc consideration are not circulated among the full Court, and even when en banc consideration is requested by a Justice, decisions to grant or deny such motions are made solely by Respondent. *(Ex. 1, para 3, 3 paras 1, 5 & 12).*"

APPENDIX S5
Excerpts from Pages 14 - 17 of
Motion for Rehearing En Banc

A. THE PANEL HOLDS THAT A JUDICIALLY-ADMITTED FACT **MUST ALSO BE ESTABLISHED BY ADMITTED EVIDENCE**

Established Fact:

*In sworn summary judgment response in respect to which Appellee prevailed below, she listed as "**UNDISPUTED FACTS**" the date of her marriage to Maravilla as being December 24, 1970, and the date of its dissolution as being March 12, 1985 (Appendix Tab 11 [Tr. 194-195]). These facts were also repeated in a separate affidavit attached to the response (Appendix Tab 11 [Tr. 296-297]) and evidenced by attached Philippine marriage license (to Maravilla) (Appendix Tab 11 [Tr. 2297]), decree of annulment (Appendix Tab 11 [Tr. 217-220]), and New Jersey certificate of marriage (to Gustilo) dated August 21, 1982 (Appendix Tab 11 [Tr. 221]).*

Authority:

Houston First American Savings v. Musick, 650 S.W.2d 764, 767, 769 (Tex. 1983) (assertions of fact in pleadings of the parties are regarded as formal, judicial admissions. A fact admitted is conclusively established in the case **without the introduction of the pleadings or presentation of other evidence**.)

Valdez v. Moore, 476 S.W.2d 936, 939-40 (Tex. Civ. App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.) (parties making **unqualified recitation in a motion for summary judgment** are bound by that recitation as a judicial admission establishing not only the admitted matter but any necessary inference. **This eliminates the adversary's necessity of proving such element** upon which it relies. For similar holding, see *Dobbins v. Caruthers*, 864 S.W.2d 754, 756 (Tex. App.--Houston [14th Dist.] 1993, no writ) and *Cameron County v.*

Velasquez, 668 S.W.2d 776, 782-83 (Tex. App.--Corpus Christi 1984, writ ref'd, no reversible error).

Rao v. Rodriguez, 1996 WL 260855 (Tex. App.--Beaumont May 16, 1996) (admissions in trial pleadings are regarded as formal judicial admissions. They are conclusive" . . . **"it is unnecessary to submit undisputed issue to jury"** (See page 10 of Westlaw print of opinion).

Opinion: The panel held it would decline to "look at statements made by Nadina in summary judgment responses and summary judgment evidence" . . . **"because these documents were not introduced into evidence . . .".** (See Opinion p.10), though urged by numerous motions.[2]

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[2] Motion in Limine (Appendix Tab 14 [Tr. 2051]); Motion for Special Instruction (Appendix Tab 15 [Tr. 2254]); Motion for Mistrial (Appendix Tab 16 [Tr. 2172 at 2176 - Motion for mistrial is requested in Motion to Strike Nadina Gustilo's Affirmative Defenses as Well as Those of June Salvacion for Whom She Negotiated as Guardian]); Appendix Tab 12 [S.F. 389-393]; Appendix Tab 18 (S.F. 407-425); objection to Jury Question 20 (Appendix Tab 19 [S.F. 1701 last two paragraphs through S.F. 1705, first line]); Appellant's First Amended Motion for Judgment (Appendix Tab 20 [Tr. 2262]); Appellants' Motion for New Trial (Appendix Tab 21 [Tr. 2476]).

B. **THE PANEL HOLDS THAT A SWORN ADMISSION IN A TESTIMONIAL DECLARATION IN A PRIOR SUIT (PETITION UNDER OATH), OTHERWISE MEETING MENDOSA (infra) TESTS, FAILS AS A PRECLUSIVE DECLARATION BECAUSE OF BEING MADE IN A DIFFERENT SUIT.**

Established Fact:

Nadina swore that she was married to Francisco Maravilla on March 17, 1983 in a successful petition for correction of entries in the certificate of birth of her daughter, June Salvacion. The decree of the court discussed as a fact her continuing marriage to Maravilla at the time of the entry thereof (see Appendix Tab 3 [Exh. P38 (Decree) at page 7]; Appendix Tab 13 [Exh. P73 (Petition)]).

Authority:

Mendosa v. Fidelity & Guar. Ins. Underwriters, Inc., 606 S.W.2d 692, 694 (Tex. 1980) (testimonial declarations [pleadings] in a different and previous lawsuit are quasi-admissions, **but they are treated as judicial admissions under circumstances set out in *Mendosa* at 694 [see as adopted in *Cortez*, immediately below]**; if sworn, the admissions are also preclusive as though made in the present case.

Cortez v. Weatherford I.S.D., WL 325090 (Tex. App.--Fort Worth June 13, 1996) (a quasi-admission will be treated as a judicial admission "if it appears that: (1) The declaration relied upon was made during the course of a judicial proceeding. (2) The statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony. (3) The statement is deliberate, clear , and unequivocal. The hypothesis of mere mistake or slip of the tongue

must be eliminated. (4) The giving of conclusive effect to the declaration will be consistent with the public policy upon which the rule is based. (5) The statement is not also destructive of the opposing party's theory of recovery," (citing *Mendosa*, 694).

Moore v. Neff, 629 S.W.2d 827 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.) **(sworn allegation in earlier divorce suit as to existence of marriage was sufficient to preclude proof of a different, continuing marriage existing at the same time);**

Cameron County v. Velasquez, 668 S.W.2d 776 (Tex. App.--Corpus Christi 1984) (the court's opinion adopts and quotes from the related holding in *Mendosa v. Fidelity & Guar. Ins. Underwriters, Inc.*, *id.*)

Huckin v. O'Connor, WL 354734 (Tex. App..--Houston [14th Dist.] 1996) **(sworn pleadings or affidavit used in summary judgment** may suffice to bar proof of contrary facts in subsequent proceeding. (See *Valdez v. Moore*, *supra*, also this court.)

Welder v. Welder, 794 S.W.2d 420, 431 (Tex. App.--Corpus Christi 1990, no writ; *Long v. Knox*, 291 S.W.2d 292, 295 (Tex. 1956), and *Moore v. Neff*, *supra*, further hold that when the testimonial declaration in a **pleading in a previous lawsuit is made under oath** and unexplained, a party in subsequent litigation, having made such previous statement under oath by prior pleading or other testimonial declaration, is barred from attempting to prove inconsistent facts in subsequent litigation.[3]

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[3] Appellants (Plaintiffs/Intervenors) urged upon the trial court below, at every reasonable occasion, the preclusive effect of the sworn declaration by

(continued...)

Opinion: The panel held **Nadina's testimonial declaration in her petition under oath, never retracted, did not meet *Mendosa* test because "pleadings in other actions ... are not conclusive but merely some evidence"** (see Opinion p.9).

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[3](...continued)
Nadina in the Philippine suit and in the court below. See: S.F. 388-393, S.F. 308,310; Tr. 2071 et seq. esp. 2076 para. 3; Tr. 2254 et seq.; Tr. 2950 et seq., esp. 2953; Tr. 2051; overruled Tr. 2057; motion denied, hearing on motions 4/5/93 pp. 129-130; also S.F. 480, motion for trial order.

APPENDIX S6

Excerpts from Pages 17-19 and 24-29 of Motion for Rehearing En Banc

C. THE PANEL HOLDS IT IS NOT BOUND TO FOLLOW DETERMINATION BY PHILIPPINE INTERMEDIATE COURT IN CASE INVOLVING SAME PARTIES AND SUBJECT MATTER DETERMINING THE INVALIDITY UNDER PHILIPPINE LAW OF A PHILIPPINE AGREEMENT BETWEEN PHILIPPINE CITIZENS, CONCERNING PHILIPPINE ESTATE OF DECEASED PHILIPPINE CITIZEN AND DOMICILIARY, CONCERNING PHILIPPINE LAWS OF SUCCESSION. **(OPINION WAS AFFIRMED BY PHILIPPINE SUPREME COURT** PRIOR TO PANEL OPINION AND PRIOR TO APPELLANTS' BRIEF.)

Established Fact:

Philippine Court of Appeals, Manila, Seventh Division, February 16, 1993 reviewed the order of Philippine trial court sitting in probate concerning the compromise agreement. The Philippine proceedings involved the same parties and subject matter involved in this present attempt by Nadina and by June Salvacion to assert the compromise agreement as determining heirship and distribution.[4] *The compromise agreement was found to be "null and void ab initio". The Philippine court stated that "it could never become final and executory" (see Appendix Tab 3 [Exh. P38 at p.8]; also attached as Exhibit to Appellants' Notice of Two Foreign Judgments, filed April 29, 1994).*

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[4] The panel states that the "question before the court was the validity of the compromise agreement" (Opinion p.10, also see Opinion p.17)

Both Defendants raised the issues of waiver, renunciation, repudiation, and assignment of interest clauses of the agreements, claiming these were severable, but the Supreme Court of the Philippines, on March 23, 1994, denied all contentions and defenses of Defendants "for lack of merit" and emphasized that its decision was "final". (See Appendix Tab 22 [decision on motion for rehearing, attached as Exhibit "A" to movant's Motion for Extension of Time for Filing Appellant's Brief, filed in this Court May 9, 1994]).

Authority:

Gannon v. Payne, 706 S.W.2d 304 (Tex. 1986) ("scrupulous adherence" must be given policy of allowing parallel foreign and domestic proceedings [page 306]. The court also held: ". . . once a final judgment is reached in one of the actions the second forum is usually obliged to respect the prior adjudication . . . if both proceedings continue, **there should be only one judgment recognized in both forums**". The court stated as policy that "we must rely on the court system of a sister common law jurisdiction to recognize the same rule of comity we now apply" [page 307]). (The Philippine Republic adopted the British common law. Its courts often cite U.S. authorities.)

Robertson v. Estate of McKnight, 609 S.W.2d 534, 537 (Tex. 1981) (Texas courts will only refuse to enforce foreign law which violates good morals, natural justice, or is prejudicial to the general interests of its own citizens. The law to be applied is to be determined by the most significant relationships test, as set out in Section 6 and 145 of the Restatement [2d] of Conflicts).

Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986) (a judgment in a second case based on the preclusive effects of a prior judgment should not stand

if the first judgment is reversed. The same issues should not be relitigated between the same parties with the possibility of inconsistent results. **Once litigated in a fair forum, that result should be binding). (Appellees introduced the Philippine trial court decree and relied heavily upon it in all the proceedings below and in this Court. It has now been conclusively reversed.)**

Liberty National Fire Ins. Co. v. Hon. Ted Akin, 1991 WL 378330 (Tex. July 8, 1996) (pendency of an appeal will not defeat claim preclusion).

Texas Beef Cattle Co. v. Jeff Green, 921 S.W.2d 203 (Tex. 1996) (though carefully excepting a suit for malicious prosecution from the general rule because of the nature of a claim for malicious prosecution, the Supreme Court reaffirmed *Scurlock*, stating that it had carefully weighed the alternatives and had concluded that a judgment should be final for purposes of issue and claim preclusion, regardless of the taking of an appeal. The purpose stated was that the court wished to reject the "nonsensical alternative of retrying the same issues between the same parties in subsequent proceedings", [see page 206).For further authority, see Footnote 4.[5]

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[5] *Street, Judge 352nd Judicial District Court, Relator, v. Hon. Second Court of Appeals*, 756 S.W.2d 299, 302 (Tex. 1988) (the Supreme Court reaffirmed its holding in *Scurlock* that a judgment is final for purposes of issue preclusion or collateral estoppel despite the pendency of an appeal); *Seth v. Seth*, 694 S.W.2d 459 (Tex. App.--Fort Worth [2 Dist.] 1985, no writ) (case represents the exception to general rule. The exception applies where a foreign decision is not followed because of the harshness of the foreign law which produces results which are against the public policy of Texas); *J.J. Gregory Gourmet Services, Inc. v. Antones Import Co.*, 1995 WL 456238 (Tex. App.--Houston [1 Dist.] 1995) (citing *Scurlock*, the court holds that a judgment on appeal is considered final for purposes of claim and issue preclusion [page 2]); *Jackson v. Smith Sec. Service, Inc.*, 786 S.W.2d 787 (Tex. App.--Houston [1 Dist.] 1990, no writ) (citing *Scurlock*, the case holds that a judgment is final

(continued...)

Opinion: **The panel held flatly that ". . . the doctrine of res judicata was inapplicable . . . because the Philippine judgment was not final . . ." and "had not been made to [sic] a court of last resort . . ."** at the time Appellants requested that it be noticed by the trial court (see Opinion p.17). **The panel also obviously declined to apply Philippine law expressed in the opinion and confirmed by the Philippine supreme court by which the agreement was made void.**[6]

. . .

(Text Omitted)

F. THE PANEL OPINION AND RESULTS CONFLICT DIRECTLY WITH PHILIPPINE STATUTORY LAW AND AUTHORITATIVE PHILIPPINE APPELLATE COURT DECISIONS UPON PECULIARLY AND EXCLUSIVELY PHILIPPINE QUESTIONS OF IMPUGNATION OF LEGITIMACY OF PHILIPPINE CITIZENS, FILIATION AND SUCCESSION OF PHILIPPINE CHILDREN, AND THE PECULIARLY AND EXCLUSIVELY PHILIPPINE CONSIDERATIONS OF LAW AND POLICY AS APPLIED TO THE DETERMINATION OF THE VALIDITY OF AN AGREEMENT AFFECTING PHILIPPINE SUCCESSION RIGHTS AND STATUS NEGOTIATED AND ENTERED INTO IN THE PHILIPPINES, AMONG EXCLUSIVELY PHILIPPINE CITIZENS DOMICILED IN THE PHILIPPINES

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[5](...continued)
for the purpose of issue and claim preclusion, despite taking of an appeal, unless the appeal is actually a trial *de novo*).

[6] By footnote 6 to the Opinion (page 17), the panel accepts application of Chapter 36 of the Texas Civil Practice and Remedies Code but misapplies §36.007 and misses the point of *Gannon*. Further, their procedural history is simply incorrect. See statement of the case, *supra*.

Foreign law neither discussed nor followed:

1. Under Article 2035 of the Philippine Civil Code (Appendix Tab 34), the Compromise Agreement (Appendix Tab 7) was void ab initio as construed and applied in *Jose Vicente Gustilo, III v. Agdamag* (Appellants Tab 3 [Exh. P38]). On denial of rehearing, all questions of severability being urged were finally rejected by the Philippine Supreme Court.

2. Under Philippine opinion of the Court of Appeals, Seventh Division, *Gustilo, III v. Agdamag*, *id.*, the Compromise Agreement was determined to be void and all affirmative defenses and related claims were denied. The issue of severance of any portion of related defenses or claims of Appellees was finally determined against them by final order of the Philippine Supreme Court denying rehearing of such matter (Exhibit "A" attached to Motion for Extension of Time for Filing Appellants' Brief, filed May 9, 1994).

3. Under Article 263 of the Philippine Civil Code (Appendix Tab 32) and its nearly identical successor, the Family Code of the Philippines, Article 170 (Appendix Tab 35), the commentator in the Philippine Family Code, Nolledo, states concerning the prohibition of placing the legitimacy of the child in question after specified periods of time (one year), viz:

> "Once these periods expire, no action may be entertained anymore by the court. **Thereby the status of the child becomes fixed. The status then can no longer be questioned in any other case or forum."**

See page 54 of the Philippine Family Code, Nolledo (Appellants' Appendix of Philippine and New Jersey Statutes and Authority, second tab):

> **". . . said issue may no longer be inquired into, even by way of defense or in a collateral**

issue in another action for a different purpose (id. p.54).

4. Under Articles 263, 255 and 256 of the Philippine Civil Code, June Salvacion's status as the legitimate child of Francisco Maravilla was fixed, and but one statutory means of impugning the legitimacy of June Salvacion existed. This was an action for impugnation which could not be brought by the mother of the child under Philippine law.

5. The Supreme Court of the Philippines twice made generic determinations that any trial court, on pleadings to correct the record of a certificate of birth, was without jurisdiction or power to adjudicate filiation or heirship. *Republic v. Bartolome*, *supra*, and *V.D.A. DeCastro v. Republic*, *supra*. No decision by the Philippine Supreme Court **permitting the impugnation of legitimacy** by means of "correcting the registry" has been found.

6. Under Article 15 of the Civil Code of the Philippines Annotated, Paras, Ninth Edition 1978 (Appendix Tab 29), setting out the conflicts of law standards of the Philippines, a foreign marriage, if void where performed, would be void in the Philippines; but if not void where performed but bigamous under Article 71 of the Civil Code of the Philippines, would be also void in the Philippines (see Appendix Tab 30).

7. The Supreme Court of New Jersey has determined, upon facts remarkably similar to those in this case, that a bigamous marriage in New Jersey is void from its inception. *Dakunzo v. Edgye*, 117 A.2d 508 (N.J. Sup. Ct. 1955) (Appendix Tab 8). The false and self-serving recitation by Nadina on the application that an annulment has occurred is not a finding or entry by a public official, but is, itself, a cause for invalidity under *Dakunzo* (Appendix Tab 8). The checkmark next to "annulled" is not evidence and is inadmissible against a contrary sworn declaration or judicial admission.

Opinion: The Opinion never discusses the panel's duty to apply the law of the jurisdictions having the most significant relationship with the particular subject matter, such as the agreement for succession and status, and such as impugnation and filiation, succession and heirship, and foreign marriage.

1. The panel Opinion (without discussion) held: Compromise Agreements (Appendix Tab 7) in direct violation of a Philippine statute were, nevertheless, valid. (The Supreme Court of the Philippines has, by affirming an express holding on the matter, determined that the statute (Article 2035 P.C.C., *id.*) applies to the Compromise Agreements and vitiates their every aspect (see discussion, pages 17-19, *supra*. **The panel Opinion cannot be enforced in the Philippines, the domiciliary seat of administration in potential control of the entire estate, because on the day pronounced, it was already in direct conflict with a final decision of the Philippine Supreme Court.**

2. Without discussion or citation of other authority, the panel has rejected as an authoritative expression of Philippine law the opinion of the Philippine Court of Appeals--confirmed by the Philippine Supreme Court--that the Compromise Agreements are void. (Discussion of *Gustilo v. Agdamag* as authoritative and also panel's denial of comity and res judicata duties under private international law is discussed, pages 17-19, *supra*).

3. The panel declined to discuss Philippine law by which the legitimacy of June Salvacion was assured (whether or not records of the Registrar were changed). By its precedent-shattering decision, the panel has rejected long-standing public policy of the Republic of the Philippines protecting the integrity of the family (Sections 263, 255, 256 of the Civil Code of the Philippines) and has permitted a novel means of impugnation of legitimacy and means of establishing family status and inheritance rights with no one representing the interests of the child and other affected parties. The simple, expedient change of the records in the Registrar's office is made to suffice. (This

method of impugnation has not previously been recognized in the Philippines or in the State of Texas.)

4. Without discussion of Sections 263, 255 and 256 of the Civil Code of the Philippines or decisions of the Supreme Court of the Philippines contrary to its Opinion (*Republic v. Bartolome* [Appendix Tab 26] and *DeCastro v. Republic*, *supra*), the panel has concluded that Judge Veloso, in an *ex parte* proceeding to correct a public record, had the judicial power to determine the filiation of June Salvacion upon a petition of her mother not requesting this relief, in an ex parte proceeding seven years after her birth, in which June Salvacion was not represented, and has decided that such representations in a non-contested order are binding upon all parties in this heirship proceeding. (In *Republic v. Bartolome* [Appendix Tab 26] and *V.D.A. DeCastro v. Republic* [Appendix Tab 27], the Philippine Supreme Court held it had "set to rest" any claim that such judicial power existed in a Philippine court as a result of a petition to obtain a correction of the record.)

5. The panel Opinion does not discuss its ruling under any hypothesis that a self-serving entry in an application by Nadina ("[ ] annulled"), not the decision or act of any public official, would have no weight and, more correctly, would be inadmissible against two separate testimonial declarations under oath (one of these declarations the trial court below accepted as "UNDISPUTED FACT" on a summary judgment motion when Nadina was defending by seeking to prove a Texas marriage under Texas Family Code Sections 2.01 and 2.22). Near conclusion of Plaintiffs' case, the court observed: "Counsel, I don't think we are going to have a dispute that she got married to this guy [Maravilla] in 1970 or that there was a civil annulment in 1985" [Appendix Tab 12 (at S.F. 395)]. But the Opinion does declare valid an otherwise invalid, bigamous, 1982 New Jersey marriage of Philippine citizens, void under the laws of the New Jersey licensing jurisdiction (see *Dakunzo*, *supra*) and an abomination under Philippine law (Article 71, Civil Code of the Philippines [Appendix Tab 30]; see item 6 page ____,

supra, and this page, *infra*). This result is made possible by mid-trial rulings by which the trial court refused to give recognition to a plainly-stated, sworn waiver of evidence (judicial admission) made in the record under oath by Nadina.

Inasmuch as the Philippine Civil Code does not allow intrusions upon its jurisdiction to disapprove bigamy of its non-Muslim citizens regardless of the situs at which the marriage license was obtained (see Article 15 [Appendix Tab 29] in conjunction with Article 71 [Appendix Tab 30], *id.*), and because the records of Nadina's annulment in 1985 and her sworn testimonial declaration in the case decided by Judge Veloso are available against her in the Philippine Courts, conflicting decisions may well occur if the Opinion is not corrected. But the error of the panel will perpetuate itself in the Philippines if the Philippine courts show comity deference to the incorrect panel Opinion.

APPENDIX S7

Excerpts from Pages 21-23 and 29-30 of Motion for Rehearing En Banc

E. THE PANEL TREATED RECITATIONS IN THE EX **PARTE, AGREED JUDGMENT** IN AN ENTIRELY COLLATERAL PROCEEDING TO CORRECT CLERICAL ERROR IN A BIRTH CERTIFICATE AS **BINDING FINDINGS OF FACT, AFFECTING THE RIGHTS OF JOVI AND MARY JOY**, THOUGH THEY WERE NOT PARTIES TO THE SUIT.

Established Fact:

Appellee never pled that the foreign decree was enforceable in this proceeding to either estop or prohibit a contrary claim. *Nadina's petition was not one for impugnation of legitimacy or for proof and establishment of filiation or heirship. There is no summary judgment evidence in the record of sexual contact between Armando Gustilo and Nadina Maravilla* ***during the period of time within which she might have become pregnant with the child, June Salvacion***[7]*, and the Veloso order does not provide such proof, which would be unnecessary for the correction of clerical error. (The court did express a vague "back handed" conclusion that*

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[7] Though the issue was stated in argument and in Appellants' motions for summary judgment (see Appendix Tab 25 [Appellants' Brief pages 8, 29, and 31 part D, sub-points j and l]), no sworn summary judgment response ever presented "clear and convincing" evidence of sexual contact with Armando Gustilo during that period of time. The Philippine court (Judge Veloso) concluded that Francisco Maravilla (who did not participate or testify) "ceased living" with Nadina in February 1977 and that since then Nadina "had no carnal relations with any other man". This finding falls far short of the requirements of impugnation under Philippine law, about which the court has been thoroughly briefed.

Nadina did not sleep with anyone else during that time--his information being from a prohibited source--Nadina.) It is uncontested that Nadina was married to Francisco Maravilla at the time she became pregnant and at the time of the birth of June Salvacion and had one previous daughter by Francisco Maravilla. Seven years after June Salvacion's birth, Nadina Maravilla, swearing that she was at that time married to Francisco Maravilla, brought an action, entitled "Nadina Maravilla v. Local Civil Registrar" for the purpose of correcting entries in the record of June Salvacion Maravilla's birth (Appendix Tab 13 [Exh. P73]). ***June Salvacion was not a party to the proceeding in any fashion nor represented by an attorney ad litem or guardian,*** *and the suit could not have been a suit to determine paternity under Philippine law.*[8]

Authority:

Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 363 (Tex. 1971) (parties or their privies must have been "cast as adversaries" and "had their day in court" in order to be bound under the doctrine of collateral estoppel by the decision of a court).

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[8] The suit was not to determine heirship, as Armando Gustilo was not deceased. **The suit was tried ex parte.** Though an instrument was filed in the proceedings bearing the name "Armando Gustilo", this was before amended pleadings naming him as a party were filed, and the instrument is unproved as to authorship. It did not qualify as summary judgment evidence. Likewise, Francisco Maravilla may have signed the original petition, but it was before he was named as a party in an amended petition, as no service of citation was ever obtained upon him personally. From the record he appears to have been avoiding service. (Compare signature of Maravilla on his marriage license [Appendix Tab 11 (Tr. 2297]) with purported signature on petition [Appendix Tab 13 (Exh. P73)].)

Garza v. Maverick Market, Inc., 768 S.W.2d 273 (Tex. 1989) **(self-serving recitations of non-essential facts in an agreed judgment bind only the parties and their privies.** Similar rule announced in *Edinberg Cons'd Sch. Dist. v. INA and CIGNA*, 806 S.W.2d 910 at 914 (Tex. App.--Corpus Christi 1991, no writ).

United States Aviation Underwriters v. Olympia Wings, Inc. v. Aetna, 896 F.2d 949 (C.A.5) (Tex. 1990) (a consent judgment is inadmissible against one who was not a party or in privity with the party and such non-participating entity is not bound - **disposes of claim that objection to prior judgment constitutes a prohibited collateral attack** [see Fn.2]; for there is "no need to attack a judgment, collateral or otherwise, that does not bind it under rules of res judicata or collateral estoppel", citing 41 Tex. Law Rev. 163 (1962).

Silva, as next friend of E.L.S. v. Enz, as Admin. and next friend of Jason Eng, 853 S.W.2d 815 (Tex. App.--Corpus Christi 1993, writ denied) (a prior order disestablishing the presumed father--the mother's husband--as father of E.L.S. was not admissible in a proceeding to determine heirship. The court held, at page 818, **the prior judgment lacked identity of parties and similarity of issues and was "inadmissible", citing *John Deere Co. v. May*, 773 S.W.2d 369, 374** (Tex. App.--Waco 1989, writ denied).

Joplin v. Meadows, 623 S.W.2d 442 (Tex. Civ. App.--Texarkana 1981, no writ) (allegations in divorce petition that husband abandoned wife the day after marriage with child being born to wife 25 months later was not competent evidence about access for the purpose of overcoming presumption of legitimacy; and **the decree of divorce, itself, containing such recitations was merely hearsay**).

Opinion: The panel found that **". . . the order of the Philippine trial court standing alone was sufficient to establish that June is the child and heir of Gustilo as a matter of law."** The Philippine decision was treated both **as conclusive summary judgment evidence** and as res judicata of succession issues, and Appellants were treated as being engaged in an unauthorized collateral attack on the Veloso decision. [Appellants, as non-parties, have simply shown the non-eligibility of the decree to control decision on matters in this proceeding. Also, under Philippine law, the decision could not be construed as affecting heirship or filiation. On its face it does not do so. To construe or test judicial power is not to collaterally attack.]

To prevail, June Salvacion had to establish her case by more than "clear and convincing" proof. Her evidence must have been conclusive on summary judgment.

To the extent that the Veloso decision is beyond the pleadings and purports to affect substantial rights of June Salvacion, Mary Joy or Jovi (renders June Salvacion illegitimate and relieves responsibility of her presumed father, diminishes or increases the inheritance of any of the parties), the decision also is clearly **void** according to the cited Philippine law. The decision is now under direct attack before the Supreme Court of the Philippines.

But the decision is simply not admissible in these proceedings nor binding upon Mary Joy and Jovi. **For it to be so would be a denial of due process to Appellants.** (See *Benson, id.*). Further, it is necessary for this court to apply Philippine law to determine the effect of the Philippine decree, if any, beyond providing a mere "correction" of a name in birth certificate. The birth certificate, itself, under Philippine law has no effect, as it is unsigned and unauthenticated.

This court has substituted its own legal analysis of the effect of the Veloso decision for the legal analysis of similar

decisions by the highest court of the Philippines, even though this proceeding involves a Philippine child of Philippine parents who are Philippine citizens and domiciliaries. It is an extraordinary breach of the principles of comity and the law of conflicts in the United States to attempt to adjudicate familial matters and questions of descent among Philippine citizens involving a Philippine estate in a manner directly contrary to Philippine law as interpreted by the highest court in the Philippines.

G. THE PANEL DECISION DEPRIVED APPELLANTS OF DUE PROCESS BY CONCLUDING AGAINST APPELLANTS A PORTION OF THEIR INHERITANCE RIGHTS THEY WERE SEEKING IN A PROCEEDING TO DETERMINE HEIRSHIP IN WHICH THEY INTERVENED. AGREED, EX PARTE FINDINGS OF A DIFFERENT COURT IN AN ACTION TO CORRECT A PUBLIC RECORD, WITH RESPECT TO WHICH MARY JOY, A MINOR, AND JOVI HAD NEITHER NOTICE NOR AN OPPORTUNITY TO PARTICIPATE WERE ERRONEOUSLY MADE CONCLUSIVE AGAINST THEM BY THE PANEL OPINION.

Established Fact:

Neither June Salvacion, who, according to Appellee, lost her legitimacy and whose parents were changed without her participation or consent, nor either Mary Joy or Jovi were participants in the correction of birth certificate proceeding presided over by Judge Veloso in the Philippines. The Philippine "trial" was conducted ex parte according to the representations in the decree itself (Appellants Tab 3 [Exh. P38]; also Appendix Tab 23 [Tr. 589 - Veloso order]), and the proceeding could not have been for the purpose of determining heirship. Strict guidelines apply to impugnation (disestablishment) proceedings in the Philippines. The petition seeks only

correction of the record; so that the proceeding could not have been a proceeding for the purpose of challenging the legitimacy of June Salvacion, who was never even joined as a party through the appointment of an attorney ad litem or guardian.

Authority:

Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 363 (Tex. 1971) (due process requires that a judgment not bind parties not before the court or in privity with a party who actually litigated the issue in question).

Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816 (Tex. 1984, reh'g denied) (judgment not binding against non-parties unless the party or a privy to a party was cast as an adversary).

Edinberg Cons'd Sch. Dist. v. INA and CIGNA, 806 S.W.2d 910 at 914 (Tex. App.--Corpus Christi 1991, no writ) **("self-serving recitations of non-essential facts in an agreed judgment bind only the parties and their privies")**

United States Aviation Underwriters v. Olympia Wings, Inc. v. Aetna, 896 F.2d 949 (C.A.5) (Tex. 1990) (a consent judgment is inadmissible against one who was not a party or in privity with the party and such non-participating entity is not bound - **disposes of claim that objection to prior judgment constitutes a prohibited collateral attack**; for there is "no need to attack a judgment, collateral or otherwise, that does not bind it under rules of res judicata or collateral estoppel", citing 41 Tex. Law Rev. 163 (1962).

Dryer v. Greens, 871 S.W.2d 697, 701 (Tex. 1993) (it is **fundamental error to adjudicate a minor's rights when the minor does not have proper, separate**

representation [citing M.K.T.R.R. Co. v. Pluto, 138 Tex. 1, 5-8, 156 S.W.2d 265, 268-60]). In the absence of contrary cited Philippine authority, it will be presumed that Philippine laws also protect Philippine children from being made illegitimate or from status changes with commercial implications. *[Petitioners' Note: This is not a holding of the court but is a footnote to a dissent in which the Chief Justice was joined.]*

Opinion: The panel concluded: ". . . we find that **the order of the Philippine trial court standing alone was sufficient to establish that June is the child and heir of Gustilo** as a matter of law" (Opinion p.11) and "**sufficient summary judgment proof to support trial court's finding that June was the daughter and heir . . .**" (Opinion p.14), ". . . arguments . . . raised by appellants . . . constitute a collateral attack" (Opinion p.13, also p.14).

Thus, the panel concluded that the Veloso findings in a proceeding to correct public records also were non-controvertible, clear and convincing summary judgment evidence of filiation, heirship, and non-paternity (impugnation), as well as paternity, and that the ex parte proceeding was binding upon any person who might, thereafter, make a claim against the estate of Armando Gustilo, deceased. (The order does not have sufficient summary judgment findings even if the findings were admissible. Neither impossibility of access under Philippine law nor evidence of insemination by Gustilo are adequately supported by found facts.)

APPENDIX S8

Excerpts from Pages 7-10 of Motion for Rehearing En Banc

. . .

(Text Omitted)

. . . the recitations by the panel appear to Appellants to be decidedly unbalanced and incorrect.

. . .

(Text Omitted)

1. Armando Gustilo, a Philippine citizen, died in December 1986, 10 years ago, when his child, Mary Joy Gustilo ("Mary Joy") was a minor, eight years old and not *sui juris*. She was nine when the Compromise Agreement (Appendix Tab 7) was reached whereby Nadina Maravilla ("Nadina"), the administratrix in the court below, acquired from Mary Joy and her half-brother, Jose Vicente Gustilo, III ("Jovi"), the entirety of the estate being administered in the United States, though none of it was disclosed in the compromise documents or in any accounting or inventory filed in the Philippine probate court. There is no evidence that Mary Joy received any particular sum of money from the estate, and evidence is unclear that her guardian ever got quiet title **for Mary Joy's benefit** to any real property apart from property to which the guardian, Milagros Barco, already had a claimed right. Milagros Barco and various attorneys did receive a large cash payment of about $500,000, possibly from the estate, for the benefit of Mary Joy. But the record does not directly reflect its source. Jovi had difficulty in obtaining titles, but he was more successful in protecting his inheritance, using similar "self help" methods to those employed by Nadina. He did "take possession" of certain properties he believes to belong to him.

2. Probate proceedings were initiated in the Philippines by Milagros Barco's filing of an application for letters of administration as the guardian and next friend of Mary Joy Ann Gustilo, a daughter of the deceased. Nadina, claiming to be the widow of the deceased Gustilo, intervened to stay proceedings pending her negotiations for a settlement with applicant and Jose Vicente Gustilo, III. **Before Compromise Agreements (Appendix Tab 7) were made, Nadina secretly filed an application for letters of administration in the probate court in Houston, Texas, in which she swore that she and her daughter, June Salvacion, were the only heirs. She mentioned no other claimants.** Notice was issued to no other parties. Nadina swore that the deceased, Armando Gustilo, was a domiciliary of the State of Texas and that all of the deceased's assets reflected in the first inventory she filed (later amended) were community assets. (Nadina, not Appellants, was the party desiring two bites of the apple.) **After having obtained an order of the court appointing her as administratrix** of the estate of Armando Gustilo, deceased in Houston (the claimed domiciliary estate), she negotiated with the heirs, Mary Joy Ann Gustilo and Jose Vicente Gustilo, III, and obtained their agreement **for a price** to quitclaim to her their rights in all of the assets of the estate excepting a specified list of properties and to allow her to be administratrix of the estate in the Philippines. The estate disclosed in the Compromise Agreements (Appendix Tab 7) filed in the Philippine probate court reflected a small estate of about $100,000. Heirship status was stipulated in the agreement.

The panel has concluded that Nadina, the administratrix of the Texas probate proceeding, was within her rights to pay cash to Jovi and to the guardian of the minor child, Mary Joy, and to promise--in the future--to convey or quitclaim to them certain Philippine properties in exchange for assignment to her of all of the remaining estate properties, **inclusive of the entire estate under administration in Texas**.

The inheritance of two minor children, as well as that of Jovi, was seemingly passed effectively to the administratrix, Nadina, in her individual capacity, with no probate court oversight or scrutiny of the obvious "insider" fiduciary transaction prohibited by Section 352 of the Texas Probate Code. The aftermath is that, today, the Agreement has been ruled "void" in the Philippines, the orders of the Texas probate court for Nadina to account or to permit discovery or to return funds and the like, remain unsatisfied (see Appendix Tab 1 [Exh. P31, P32, P36], and an expensive jury trial has replaced the statutory scheme requiring application and approval. There will be no Texas remedy under the uncorrected panel Opinion. (But the domiciliary [Philippine] estate which can claim the right to administer all personal property may look to a decision of the Philippine Supreme Court to support any demand it may make for collection or distribution of the funds now in the Texas administration--an assured conflict.)

Nadina presented the settlement agreement, with its attached inventory of only a few Philippine assets, to the court sitting in probate in the Philippines. Judge Agdamag did give approval. Subsequently, Jose Vicente Gustilo, III and Mary Joy Ann Gustilo moved, by separate motions, for the court to set aside its order approving the agreement. The Supreme Court of the Philippines ultimately confirmed that the agreement was void under Philippine law and should not have been approved. (It should not have been approved in Texas in this proceeding.) **Since the Philippine Supreme Court opinion, Appellees have not argued with cited authority that the agreements are not, in fact, void under Philippine law and that Philippine law does not apply as the standard by which they must be judged.**

In the United States in the probate court below, Jose Vicente Gustilo, III and Mary Joy Ann Gustilo filed a complaint to remove the administratrix upon grounds of defalcation with funds of the estate, failure to have sought a determination of heirship for a period of four years, and failure to gather and account for properties of the estate. (Nadina today is still in

default of the probate court's order for her to return $250,000 [Appendix Tab 2 (Exh. P16)].) At approximately mid-point in the hearing on the complaint for removal of the administratrix, she agreed to resign. (The Appellees had vigorously claimed that the Compromise Agreement [Appendix Tab 7] and Judge Agdamag's approval effectively estopped Mary Joy and Jovi from either claiming standing or removing Nadina.) Before trial Nadina was also removed as administratrix in the Philippines as a result of the decisions of the Philippine Court of Appeals (Appellants Tab 3 [Exh. P38]).

An application for the determination of heirship was filed in the court below by Dr. Gerardo Gustilo on the 12th day of April, 1991. Jose Vicente Gustilo, III intervened in this application. Mary Joy Ann Gustilo filed a parallel application. Undersigned counsel was retained by both Jovi and Mary Joy, and the applications of the Appellants are combined in the Third Amended Response and Joinder in Support of Application for Declaration of Heirship (Appendix Tab 4 [Tr. 1173]).

After cross summary judgment motions regarding June Salvacion's claim of heirship and a summary judgment motion against Nadina's claim to be surviving widow were resolved against Mary Joy and Jovi by the probate court below, and after Mary Joy and Jovi prevailed in their heirship claims by partial summary judgment, trial was commenced on the amended pleas in intervention of Mary Joy (through her guardian, Milagros Barco) and Jovi.

Most of the grounds of error made the subject of this appeal relate to the partial summary judgments and the subsequent trial which was concerned with two issues, primarily:

1) Attempted enforcement by June and Nadina of void Compromise Agreements, and

2) Attempted establishment by Nadina of a claim to heirship through a void and bigamous marriage.

The Compromise Agreements are simply void under authoritative decision of the Philippine Supreme Court. Likewise, all defensive issues related to the Compromise Agreements (Appendix Tab 7) are determined against Appellees, who are barred from offering evidence to support them by decision of the Philippine Court of Appeals in *Gustilo v. Agdamag* (Appellants Tab 3 [Exh. P38]).

The panel is clearly in error in supposing that Appellants have not thoroughly attacked the prima facie case of Nadina (Opinion p.7). The judicial admissions and testimonial declarations under oath specifically urged upon the trial court as a basis for instructions and barring evidence were conclusive and are considered as excluding all opposing evidence. There is no evidence to support Jury Question 20 in respect to the second paragraph of instructions in the charge under Question No. 20 concerning subsequent marriages during lifetime of spouse in previous marriage. (See Appendix Tab 6 [Jury Question 20 is at Tr. 2355]). Further, the findings of the Philippine Court of Appeals in *Gustilo v. Agdamag* regarding Nadina's first marriage and the date she claimed it was annulled are not being employed as an additional attempt to prove up the record or documents evidencing such claims, as the panel has supposed. They are merely findings by the Philippine court as to what Nadina claimed in that proceeding in which all parties were present. (The panel gave conclusive effects to Judge Veloso's agreed findings [*Maravilla v. Local Civil Registrar* (Appendix Tab 13)] from an ex parte hearing not including Mary Joy, Jovi, or June Salvacion as parties.)

Appellants have argued that the Compromise Agreement must be construed and enforced or denied enforcement strictly in accordance with Philippine law. Appellants moved the court below for instructions on this point, opposed related jury questions, filed a motion and amended motion for judgment, and

otherwise throughout the trial protected their position that all settlement-related issues were concluded against Defendants. Yet, the Agdamag decision by the trial court and the Compromise Agreements which had been declared to be void *ab initio* were introduced into evidence by Appellees over the strenuous objections of Mary Joy Gustilo and Jose Vicente Gustilo, III, who urged upon the court their claims that they were void and were in disregard of the doctrines of res judicata and comity, as well as stare decises and law of the case (the domiciliary administration controls over the ancillary administration) (Appendix Tab 5 [S.F. 559-565]). The exhibits were extraordinarily prejudicial and were a deliberate introduction of matter argued to the jury as though enforceable, though clearly found by the Philippine Appellate Court to be void. The Philippine administration is the domiciliary administration of the estate. Appellate decisions in the Philippine administration should, per force, control this ancillary administration in determination of matters, such as the effect to be given a Philippine agreement relating to succession and distribution.

The panel has concluded that Rea, Appellees' expert, possessed some useful knowledge beyond that held by every member of the jury concerning the evaluation of Philippine property he had never seen (he was unable to identify property as to kind or character--i.e., whether improved, unimproved, rural or urban--and he found that a suitable standard of evaluation was to assume that all properties were worth about P 500,000 (pesos) apiece (Appendix Tab 8 [S.F. 1316-1317]). He said he was not an expert and had no experience appraising properties (see Appendix Tab 9 [Appellants' Brief p.36] and Appendix Tab 10 [S.F. 1162, 1226, 1329-1330)]. Nadina Gustilo, on grounds of potential self-incrimination, refused to identify the source of the funds she said she paid Appellants and refused to produce cancelled checks, deposit slips, and the like, reflecting the payment. Rea assumed the funds were from the estate and made a deduction that did not result in actual diminution of any account whose records were produced. This,

alone, produced an unquestionable $1,300,000 error favoring Nadina's position. The panel concluded that Jovi and Mary Joy received (from somewhere), respectively, about $700,000 and $600,000, based on the jury's acceptance of Rea's guess. The panel does not mention that **Rea assumed Nadina had an unreported $1,000,000**, but the record reflects **she got an additional $450,000 ($250,000 in checks and $200,000 in support payments she and June received)**. Also, she had control of various seven-figure bank accounts, foreign and domestic, about which she refused to testify. **Then, she also had $1,300,000 she claims to have paid to Jovi and Mary Joy.** The trial court effectively denied Mary Joy's and Jovi's motion to strike Nadina's affirmative defenses and her own claims as an heir because of her claiming immunity under the Fifth Amendment of the United States Constitution and her failure to give court-ordered deposition testimony or appear at the trial. So, Appellants had no effective judicial assistance to enable them to get the fiduciary to prove up property that came into her possession belonging to the estate.

To crown this injustice, the court below refused properly-offered instructions requiring Nadina, as a fiduciary, to show that she made full disclosure. Then, the court approved jury questions (over objection) inquiring into funds received by Jovi and Mary Joy, but refused a question as to funds received by Nadina.